

NATIONAL SPORTING ORGANISATIONS AND THE GOOD GOVERNANCE PRINCIPLES OF THE AUSTRALIAN SPORTS COMMISSION

Lloyd Freeburn*

The Australian Sports Commission requires good governance in allocating funds and has developed Principles of Good Governance for the guidance of sporting organisations. Despite the endorsement of most of the content of the Principles by the Independent Sport Panel in its 2009 Review, there are questions about the suitability of the Principles in the context of sport, and identified shortcomings diminish their effectiveness.

Introduction

In 2009-10, the Australian Sports Commission ('ASC') supplied National Sporting Organisations ('NSOs') with over \$100 million in grants and allocations.¹ As the federal government agency which dispenses public money, the ASC has been concerned to ensure that these funds are properly accounted for: that it is paid to organisations that are able to demonstrate that they are properly governed. To achieve this, the ASC has developed good governance principles² that are to be adopted by NSOs in order to be considered for funding by the ASC.³ The ASC Principles are apparently based on the Australian

* Lloyd Freeburn, LLB (QLD), Masters of Commercial Law (Melb); Senior Fellow, Melbourne University Law School.

¹ Australian Sports Commission, *NSO 2009/10 Grants and Allocations* (2009) Australian Sports Commission <http://www.ausport.gov.au/__data/assets/pdf_file/0004/336415/2009-10_ASC_Funding_to_NSOs_as_at_3_December_2009_.pdf>. Including Paralympics, the total grants and allocations for the 2009-10 financial year was \$102 999 145. An additional \$1.135 million was allocated to disabled athlete sporting organisations: Australian Sports Commission, *NSOD Grants* (2010) Australian Sports Commission. <http://www.ausport.gov.au/__data/assets/pdf_file/0011/314579/2009-10_ASC_Funding_to_NSODs_as_at_4_August_2009_.pdf>. The latest grants and allocations to NSOs can be found at Australian Sports Commission, *National Sporting Organisations*, <http://www.ausport.gov.au/supporting/funding/system_partners/national_sporting_organisations>

² Australian Sports Commission, *Governance Principles: A Good Practice Guide for Sporting Organisations* (2007). <http://www.ausport.gov.au/__data/assets/pdf_file/0004/193027/ASC_Governance_Principles_2007.pdf> (The 'ASC Principles').

³ Australian Sports Commission, *Eligibility Criteria for the Recognition of National Sporting Organisations by the Australian Sports Commission 2009-2013*, Criteria A7 <http://www.ausport.gov.au/__data/assets/pdf_file/0003/336432/ASC_Eligibility_Criteria_for_NSO_recognition_2009-13.pdf>. See also Australian Sports Commission, *ASC Recognition* <http://www.ausport.gov.au/supporting/nso/asc_recognition>.

Institute of Company Directors guidelines⁴ and appear to be ‘a combination of principles from the governance of corporations and the governance of non-profit entities’.⁵

In its recent report,⁶ with one exception, the Independent Sport Panel generally endorsed the governance advice provided by the ASC to NSOs.⁷ Despite this, a more detailed analysis of the ASC Principles indicates that caution is required before too much can be made of this endorsement. A considered analysis of the Principles highlights a number of issues. A core issue to be considered is how well the ASC Principles have been conceived in light of the context in which they apply. This paper critically examines the ASC’s Principles and considers their effectiveness and appropriateness in promoting good governance amongst NSOs.

The first part of this essay deals with the background to corporate governance principles and then with their application and effect on sporting organisations. The roles of the ASC and NSOs are outlined. This is followed by a description and analysis of the ASC Principles including by reference to the corporate governance principles of the Australian Securities Exchange⁸ and relevant aspects of the *Corporations Act 2001* (Cth). Aspects of the duties of directors of NSOs are discussed. This is followed by a discussion of a range of issues that highlight the specific circumstances of NSOs and the ways in which the ASC Principles deal or fail to deal with these circumstances. Particular issues discussed include the different context of NSOs compared with profit motivated corporations, the significance of the contrasting approaches of prescription and disclosure that distinguish the ASC Principles from the ASX Principles and the inflexibility of the ASC Principles. Finally, there is some analysis of the ASC’s requirement for NSOs to be companies limited by guarantee and of the way in which the ASC Principles deal with the issues of remuneration, volunteers, and federal structures. In conclusion it is suggested that the shortcomings identified by this analysis diminish the effectiveness of the ASC Principles in achieving the ASC’s objective of improving the performance of NSOs.

⁴ Russell Hoyer and Graham Cuskelly, *Sport Governance*, (Butterworth-Heinemann, 2007) 11; UK Sport, *Good Governance Guide for National Governing Bodies* (2004) 27.

⁵ Hoyer and Cuskelly, above n 4, 5.

⁶ Independent Sport Panel, *The Future of Sport in Australia* (15 October 2009) <<http://www.sportpanel.org.au/internet/sportpanel/publishing.nsf/Content/crawford-report-full>>. The Panel was appointed in August 2008 by the Federal Minister for Sport, Kate Ellis with broad terms of reference to review Australia’s sports system: see Independent Sport Panel, *Terms of Reference* (3 October 2008) <<http://www.sportpanel.org.au/internet/sportpanel/publishing.nsf/Content/terms>>.

⁷ Independent Sport Panel, *The Future of Sport in Australia*, above n 6, 103–4. The exception to this endorsement was the ‘completely wrong’ view of the ASC Principles on the role of the executive team in modern sporting organisations. The Panel criticised the ASC’s ‘diminished view of the role of management’ within organisations. In particular, it found no reason for the exclusion of the CEO from the Board of NSOs and described this as being ‘completely out of step with corporate practice.’ This issue is discussed further below: see below nn 102–4.

⁸ ASX Corporate Governance Council, *Corporate Governance Principles and Recommendations* (2nd ed, 2007) <http://asx.ice4.interactiveinvestor.com.au/ASX0701/Corporate%20Governance%20Principles/EN/pdf_pages/page_0001.pdf> (the ‘ASX Principles’).

Background

Corporate Governance Principles

Effective governance is necessary for all groups to function properly whether they are corporations, schools, charitable institutions, universities, religious organisations, nation states, voluntary associations, professional sport franchises or non-profit sport organisations.⁹

A decade ago, the term ‘corporate governance’ was barely mentioned. Now, it is viewed as ‘a staple of everyday business language’.¹⁰ Interest in corporate governance was initially sparked after a number of significant corporate failures in the United Kingdom (UK) in the early 1980s and then later elsewhere. Notable more recent examples include the collapses of Barings Bank in 1995 and of Enron in 2001. Recent Australian corporate collapses attributed to failures of corporate governance include the collapses of the HIH¹¹ and OneTel¹² corporations in the early 2000’s.

The early corporate failures led to a number of inquiries.¹³ A consequence of these inquiries and the subsequent increased focus on corporate governance has been the development of standards of corporate governance by the world’s major stock exchanges and regulatory agencies.¹⁴ These principles of corporate governance are viewed as mechanisms that assist in avoiding corporate collapses.¹⁵ Other benefits of good corporate governance include improved market confidence, lower capital costs,¹⁶ increased attraction of foreign investment,¹⁷ managerial

⁹ Hoye and Cuskelly, above n 4, 3.

¹⁰ ASX Principles, above n 8, 2.

¹¹ See Commonwealth, Royal Commission into the Failure of HIH, *Final Report* (2003).

¹² See *Australian Securities and Investments Commission v Rich* (2003) 44 ACSR 341.

¹³ See, for eg, in the United Kingdom: Committee on the Financial Aspects of Corporate Governance, *Report of the Committee on the Financial Aspects of Corporate Governance* (1 December 1992) (‘The Cadbury Report’); in Australia: Fred Hilmer, *Strictly Boardroom: Improving Governance to Enhance Company Performance* (Information Australia, 1993); Business Council of Australia, *Corporate Practices and Conduct* (Information Australia, 2nd ed, 1993) (‘the Bosch Committee’); in Canada: Committee on Corporate Governance in Canada, *Where Were the Directors?* (December 1994) (the ‘Dey Report’); United States Conference Board Commission on Public Trust and Private Enterprise, *Final Report* (2003). See also Robert P Austin and Ian M Ramsay, *Ford’s Principles of Corporations Law* (LexisNexis, 13th ed, 2007) [7.650]; Hoye & Cuskelly, above note 4, 4.

¹⁴ See, for eg, Stijn Claessens, *Global Corporate Governance Forum: 1 Focus: Corporate Governance and Development* (2003); Adjith Nivard Cabraal, Marie-Laurence Guy and Chris Pierce, *Global Corporate Governance Forum: 2 Toolkit: Developing Corporate Governance Codes of Best Practice, User Guide: Volume 1 Rationale and Volume 2 Process* (2005); International Monetary Fund, *Good Governance: The IMF’s Role* (August 1997); Organisation for Economic Co-Operation and Development, *OECD Principles of Corporate Governance* (2004) <<http://www.oecd.org/dataoecd/32/18/31557724.pdf>>.

¹⁵ Christine Mallin, *Corporate Governance* (Oxford University Press, 2004) 1–3.

¹⁶ Organisation for Economic Co-Operation and Development, *OECD Principles of Corporate Governance* (2004) Preamble, 11 <<http://www.oecd.org/dataoecd/32/18/31557724.pdf>>.

¹⁷ *Ibid* 13.

improvement and enhanced stakeholder relationships.¹⁸ One example of these standards is the *Corporate Governance Principles and Recommendations* of the Australian Securities Exchange (ASX).¹⁹ The ASX Principles were first issued in March 2003 and revised in 2007.²⁰ They regulate the corporate governance practices of Australia's listed companies.²¹

While the quest for good corporate governance has been driven by significant corporate collapses, it has not been limited to publicly traded organisations.²² Both state-owned enterprises²³ and non-profit and the voluntary/community sectors²⁴ have been the subject of governance principles and best practice guidelines, as has sport itself.²⁵

Corporate Governance and Sport

In the world of sport, shortcomings in the organisational governance of sporting organisations are considered to be no less prevalent than in the corporate world.²⁶ As long ago as 1997, the Standing Committee on Recreation and Sport (SCORS)²⁷ identified a 'perceived lack of effectiveness at board and council level in national and state sporting organisations'.²⁸ Subsequent reviews, many government initiated, have been conducted into various NSOs including the

¹⁸ Stijn Claessens, *Global Corporate Governance Forum: 1 Focus: Corporate Governance and Development* (2003). For a review of the evidence of the effect of good corporate governance on shareholder value, see Colin Melvin, 'The Value of Corporate Governance', *Governance*, August 2003, at 9-11. The author here argues that active ownership is a more significant factor in increasing company performance than mere compliance with governance codes.

¹⁹ ASX Principles, above n 8.

²⁰ The second edition of the ASX Principles took effect from 1 January 2008: *ibid* 2.

²¹ ASX Listing Rule 4.10.3 requires listed companies to provide a statement in their annual reports disclosing the extent to which the Recommendations have been followed.

²² Francesco Bonollo De Zwart and George Gilligan, *Monash University Department of Business Law & Taxation Research Paper No 16: The Relationship Between Good Governance and Sustainability in Australian Sport* (4 November 2008) 2 <<http://ssrn.com/abstract=1295682>>.

²³ Organisation for Economic Co-Operation and Development, *OECD Guidelines on the Corporate Governance of State-Owned Enterprises*, (2005).

²⁴ See for example ACEVO, Charity Trustee Networks, ICSA, VCVO on behalf of The National Hub of Expertise in Governance, *Good Governance A Code for the Voluntary and Community Sector*, (June 2005).

²⁵ Governance in Sport Working Group, 'Statement of Good Governance Principles' in European Olympic Committee, Federation Internationale d'Automobile and Herbert Smith, *The Rules of the Game, Europe's first conference on the Governance of Sport, Conference Report & Conclusions*, (February 2001) 4-7.

²⁶ Hoye & Cuskelly, above n 4, 4.

²⁷ SCORS consists of representatives of the Australian federal and each State government: Australian Sports Commission, *SCORS Research Group*, <<http://www.ausport.gov.au/information/scors>>.

²⁸ SCORS Working Party on Management Improvement, 1997 10; Hoye & Cuskelly, above n 4, 5.

Australian Soccer Federation in 2003,²⁹ Athletics Australia in 2004,³⁰ Ski and Snowboard Australia in 2006,³¹ and Basketball Australia in 2007.³² Some of these reviews at least ‘have highlighted negative impacts that poor governance structures and practices have on organisational performance.’³³ Similar reviews have been conducted in the UK of Football Association clubs and of rugby union and cricket in NZ.³⁴

Reacting to the need for improved governance arrangements in sporting organisations, in 1999, the ASC published its good practice guide: ‘*Governing Sport: The role of the board and CEO*’,³⁵ which was followed by the first publication of the ASC Principles in 2002.³⁶ A number of other documents have also been published by the ASC to support its principles.³⁷

One of the first observations to be made from this brief back ground is that the perceived need for governance principles for NSOs has come about not so much to avoid the equivalent of corporate collapses but principally as a mechanism to improve organisational performance.

²⁹ David Crawford, *Report of the Independent Soccer Review Committee into the Structure, Governance and Management of Soccer in Australia* (April 2003) <<http://fulltext.ausport.gov.au/fulltext/2003/soccerinquiry/repappc.pdf>>. This review was preceded by the Stewart Report and two separate Senate Committee reports: Senate Environment, Recreation, Communications and the Arts References Committee, Parliament of Australia, *Report by the Hon. D.G. Stewart* (10 January 1995); Senate Environment, Recreation, Communications and the Arts References Committee, Parliament of Australia, *Soccer* (June 1995); Senate Environment, Recreation, Communications and the Arts References Committee, Parliament of Australia, *Soccer* (November 1995).

³⁰ Herb Elliott, *Athletics Review: Re-creating a culture for athletics in Australia* (July 2004) <http://fulltext.ausport.gov.au/fulltext/2004/ascpub/athletics/part_a.pdf>.

³¹ Kate Costello, *Review of the Governance of Ski and Snowboard Australia: Report to the Australian Sports Commission* (January 2006) <<http://www.skiingaustralia.org.au/pdfs/Report%20and%20Appendices%20-%20Executive%20Summary.pdf>>; Kate Costello, *Review of the Governance of Ski and Snowboard Australia: Addendum Report to the Australian Sports Commission* (April 2006) <<http://www.skiingaustralia.org.au/pdfs/addendum-amended-asc-review-300506.pdf>>.

³² National Basketball League, *Report of the Steering Committee, Structure and Governance Review of Basketball in Australia* (November 2007) <http://admin.nbl.com.au/site/_content/document/00005880-source.pdf>; Australian Sports Commission, *Big basketball review recommendations released*, (30 January 2008) <http://www.ausport.gov.au/media/releases/big-basketball_review_recommendations_released>.

³³ Hoye & Cuskelly, above n 4, 11; UK Sport, above n 4, 5.

³⁴ Hoye & Cuskelly, above n 4; UK Sport, above n 4; Lesley Ferkins, David Shilbury and Gael McDonald, ‘The Role of the Board in Building Strategic Capability: Towards an Integrated Model of Sport Governance Research’ (2005) 8 *Sport Management Review* 195.

³⁵ Good practice guides were also produced in New Zealand: Sport and Recreation New Zealand, *Nine Steps to Effective Governance* (2004); the United Kingdom: UK Sport, *Good Governance Guide for National Governing Bodies* (2004) and South Africa: South African Department of Sport and Recreation, *Best Practice Principles of Good Governance in Sport* (2004); Hoye & Cuskelly, above n 4, 5.

³⁶ When first published, the ASC identified five Principles of best practice corporate governance: see Chris Ryan, ‘*Sporting Bodies Urged to Practise Good governance*’ (2002) <<http://fulltext.ausport.gov.au/fulltext/2002/ascpub/governanceurge.pdf>>. The 2007 version of the Principles included a new Principle 6: Ethical and responsible decision making.

³⁷ See Australian Sports Commission, *Planning in Sport* (2004); Australian Sports Commission, *Governing Sport – The Role of the Board* (2005) <http://www.ausport.gov.au/_data/assets/pdf_file/0019/205813/Governing_Sport.pdf>; and Australian Sports Commission, *Getting it right: Guidelines for Selection* (2007).

Governance Impacts on Sporting Organisations

The possibility of catastrophic collapse obviously exists for mismanaged NSOs. However, other more relevant consequences of poor corporate governance for sporting organisations have been ‘the withdrawal of sponsorship, decline in membership numbers and participation, and possible interventions from government funding agencies.’³⁸ On a practical level, for NSOs in Australia, poor governance will compromise their capacity to secure funding from the ASC.³⁹ The federated governance structures of NSOs have also been identified as a factor that has made it harder for sports to respond to emerging commercial threats and opportunities.⁴⁰

In part supported by the conclusions of the reviews that have been conducted into sporting bodies,⁴¹ the ASC asserts that ‘It is commonly accepted that governance structures have a significant impact on the performance of sporting organisations.’⁴² This view is also consistent with the ‘broad acceptance that not-for-profit organisations need to improve their governance practices in line with accepted norms of good corporate governance.’⁴³ The ASC also notes that ‘Poor governance has a variety of causes, including director inexperience, conflicts of interest, failure to manage risk, inadequate or inappropriate financial controls, and generally poor internal business systems and reporting.’⁴⁴ These are the negative effects of poor governance for NSOs. On the positive side, ‘long term economic sustainability for a sporting organisation [which] is ... essential (or, at least, desirable) for that organisation to achieve its long-term objectives’⁴⁵ may be enhanced by the adoption of good governance practices.

Yet a qualification needs to be made: other than for some inferences to be drawn from the inquiries into a number of sporting organisations, there is little or no empirical evidence to support the general proposition that the adoption of good governance guidelines by NSOs will improve their organisational performance. Nor is there evidence to support the more specific proposition that the adoption of the ASC Principles by an NSO will have a positive effect on the performance of that NSO. While research in the corporate sector suggests a positive link between good corporate governance and firm performance, even

³⁸ Hoye & Cuskelly, above n 4, 11; UK Sport, above n 4.

³⁹ Australian Sports Commission, *ASC Recognition*, above n 3.

⁴⁰ Independent Sport Panel, *The Future of Sport in Australia*, above n 6, 102–3.

⁴¹ See above nn 29–32.

⁴² ASC Principles, above n 2, 2.

⁴³ Michael Cahill, Anona Armstrong and Haddon Storey, *Implementing Corporate Governance in the Not-for-Profit Sector* (2001) 4 <<http://www.vicsport.asn.au/Assets/Files/SRV%20-%20Implementing%20Corporate%20Governance%20in%20the%20NFP%20Sector%202001.pdf>>.

⁴⁴ Ibid. In Sport and Recreation New Zealand, *Nine Steps to Effective Governance* (2004) at 20, common governance challenges for sporting organisations were identified. Similar problems were identified in the UK: UK Sport, *Good Governance Guide for National Governing Bodies*, (2004).

⁴⁵ De Zwart and Gilligan, above n 22, 5.

this is equivocal.⁴⁶ In fact, active ownership is said to be more effective in improving shareholder value than mere compliance with governance codes.⁴⁷

Regardless, there is little debate about the application of good governance principles to NSOs. With little critical evaluation, all involved appear to proceed on the basis that the application of good governance principles is a self evident good. Before turning to a consideration of the ASC Principles in light of the structure and role of NSOs, it is first necessary to provide a little more context to the roles of the ASC and NSOs.

The Players

Australian Sports Commission

The Australian Sports Commission (ASC) is the Commonwealth Government's statutory authority responsible for developing and funding Australian sport.⁴⁸

The ASC is Australia's primary national sports administration and advisory agency, and the cornerstone of a wide-ranging sports system. On behalf of the Australian Government, the ASC plays a central leadership role in the development and operation of the Australian sports system, administering and funding innovative sport programs and providing leadership, coordination and support for the sports sector.⁴⁹

The ASC is established under the *Australian Sports Commission Act 1989* (Cth).⁵⁰ Its objects are specified by the Act and relate to developing, improving and increasing participation in sport in Australia.⁵¹ Specific objects include providing leadership in the development of sport in Australia⁵² and providing resources, services and facilities to enable Australians to pursue and achieve excellence in sport.⁵³

⁴⁶ Thomas Clark, *International Corporate Governance: A Comparative Approach*, (Routledge: 2007) 73–6.

⁴⁷ Colin Melvin, 'The Value of Corporate Governance', *Governance*, August 2003, at 9-11. It may also be observed that NSOs are less likely than traded corporations to suffer from dangerously passive ownership because they are directed by volunteer boards of management and their 'owners' are the active participants in the particular sport.

⁴⁸ ASC Principles, above n 2.

⁴⁹ Australian Sports Commission, *About the ASC: What is the ASC?*, <http://www.ausport.gov.au/about/what_is_the_asc>.

⁵⁰ *Australian Sports Commission Act 1989* (Cth) s 5. The Act sets out the objects (s 6), functions (s 7) and powers (s 8) of the Commission.

⁵¹ *Australian Sports Commission Act 1989* (Cth) s 6. These objects are supported by a strategic plan developed in accordance with s 23 of the Act: see Australian Sports Commission, *Strategic Plan 2006-2009* (2006).

⁵² *Australian Sports Commission Act 1989* (Cth) s 6(1)(a).

⁵³ *Australian Sports Commission Act 1989* (Cth) s 6(1)(c).

As a statutory corporation, the ASC's structure and governance arrangements are largely determined by its enabling statute.⁵⁴ In terms of the ASC's role relating to NSOs, the ASC does not specifically or directly possess any powers of formal supervision or direction. Its powers of influence appear principally derived from its role as a funding agency, though this avenue of influence should not be underestimated. It is this funding role that has led the Commission to develop its 'clearly stated position with respect to the governance of national sporting organisations to which the ASC provides taxpayer moneys.'⁵⁵

While the ASC's Governance Principles were developed as part of the ASC's 'role to encourage best practice management and governance in Australian sports',⁵⁶ this role is not explicitly conferred on the ASC by the ASC's enabling legislation.⁵⁷ The closest possible source of this role appears to be the legislative objective for the ASC to 'provide leadership in the development of sport in Australia'.⁵⁸ In any event, NSOs have raised no questions as to the legitimacy of the ASC's role in this area.

National Sporting Organisations

There are currently 91 NSO's recognised by the ASC,⁵⁹ more than 60 of which receive ASC funding.⁶⁰ In order for an NSO to receive funding from the ASC, the organisation must satisfy eligibility criteria established by the ASC,⁶¹ although recognition as an NSO does not carry with it an entitlement to ASC funding.⁶²

The ASC's NSO recognition criteria require that an NSO must be recognised as 'the pre-eminent organisation responsible for the development of the sport within Australia'. It must be 'accountable at the national level for providing its members with technically and ethically sound sport programs, policies and services.' It must also have been an incorporated association or a company limited by guarantee with independently audited financial statements and annual reports

⁵⁴ As noted above, the ASC's objects, functions and powers are prescribed by the *Australian Sports Commission Act 1989* (Cth). The Act also prescribes detailed arrangements regarding the constitution and meetings of the Commission (Pt III), strategic and annual operational plans (Pt IV), the duties and appointment of the Executive Director (Pt V), the appointment of staff and consultants (Pt VI), and financial arrangements (Pts VI and VIII).

⁵⁵ ASC Principles, above n 2, 1.

⁵⁶ Chris Ryan, 'Sporting bodies urged to practise good governance' (2002) <<http://fulltext.ausport.gov.au/fulltext/2002/ascpub/governanceurge.pdf>> .

⁵⁷ Section 7 of the *Australian Sports Commission Act 1989* (Cth) lists the functions of the ASC and this role is not listed in the section.

⁵⁸ *Australian Sports Commission Act 1989* (Cth) s 6(1)(a).

⁵⁹ See, as at 6 August 2009, Australian Sports Commission, *National Sporting Organisations recognised by the Australian Sports Commission*, <http://www.ausport.gov.au/__data/assets/pdf_file/0005/314807/Recognised_NSO_and_NSODs_as_at_6_August_2009.pdf>. This includes disabled athlete organisations>.

⁶⁰ Australian Sports Commission, *ASC Recognition*, above n 3.

⁶¹ Australian Sports Commission, *Eligibility Criteria for the Recognition of National Sporting Organisations by the Australian Sports Commission 2009-2013*, above n 3.

⁶² Australian Sports Commission, *ASC Recognition*, above n 3.

for at least three years. Most relevant is that to be recognised, NSOs are required to have formally committed to a 'governance structure that is consistent with the ASC's governance principles of best practice.'⁶³ Other requirements include that NSOs have active branches or affiliated State/Territory Associations in at least four States/Territories⁶⁴ and that they conduct annual regional or State championships and National championship competitions.⁶⁵

NSOs are typically operated on a non-profit basis, being focussed on developing opportunities for participation in their sport with any surplus funds reinvested in the sport for the benefit of members and participants. While 'NSOs are typically small organisations that are mostly under-resourced and dependent on public funding to survive,'⁶⁶ there are significant exceptions.⁶⁷ Nor is it even possible to simply categorise NSOs as non-profit organisations as their activities may include commercial activities indistinguishable from the activities of a for-profit corporation, notwithstanding that profits are not distributed to shareholders as dividends.⁶⁸

NSOs perform various functions relating to the sport including preparing and implementing strategic plans, promoting the sport, administering the sport's rules, regulations and officials, liaising with the relevant international sport body, developing talent and elite athletes and organising competitions. They are characterised by volunteer boards of management and are reliant on the support and work of volunteers to function. They are accountable to a wider variety of stakeholders than for-profit corporations (members, users, government, sponsors, volunteers and staff)⁶⁹ and can have complex organisational structures, with many operating under a federated structure.⁷⁰

A majority of NSOs are associations incorporated under State legislation⁷¹ with only half as many NSOs being companies limited by guarantee under the

⁶³ Australian Sports Commission, *Eligibility Criteria for the Recognition of National Sporting Organisations by the Australian Sports Commission 2009-2013*, above n 3, [A7].

⁶⁴ *Ibid* [B1]. There is some relaxation of this requirement for ice and snow sports organisations.

⁶⁵ *Ibid* [B2].

⁶⁶ Australian Sports Commission, *Submission to the Commonwealth Government's Independent Review of Sport in Australia*, October 2008, 38.

⁶⁷ For example the Australian Football League, the Australian Rugby League, Cricket Australia and Tennis Australia.

⁶⁸ Hoye & Cuskelly, above n 4, 7; De Zwart & Gilligan, above n 22, 17–18. Profits may nevertheless be distributed to members (eg league revenue is distributed to the member clubs), although with the expectation that these moneys will be 'reinvested' into the sport.

⁶⁹ Not for profit organisations are considered to differ from for profit corporations by having multiple objectives and multiple stakeholders: Ferkins, Shilbury & McDonald, above n 34, 196–7; Hoye & Cuskelly, above n 4, 6–9.

⁷⁰ Hoye & Cuskelly, above n 4, 7–8. See also L M Kikulis, 'Continuity and change in governance and decision making in national sport organisations: Institutional explanations' (2000) 19 *Journal of Sport Management* 293.

⁷¹ See *Associations Incorporation Act 1981* (Vic); *Associations Incorporation Act 2009* (NSW); *Associations Incorporation Act 1981* (Qld); *Associations Incorporation Act 1985* (SA); *Associations Incorporation Act 1987* (WA); *Associations Incorporation Act 1964* (Tas); *Associations Incorporation Act 1991* (ACT); *Associations Act* (NT).

Corporations Act 2001 (Cth).⁷² Accordingly, for the majority of NSOs, State incorporated association legislation typically deals with the issues of directors' duties and corporate governance in a limited, though varied, way. The common law is the principal source of the duties of office holders in these incorporated associations.⁷³ In contrast, the *Corporations Act 2001* (Cth) more extensively regulates governance and establishes statutory duties – which are similar to those established at common law.⁷⁴

These characteristics have implications for the type of governance structure that would be most relevant and effective for NSOs. The ASC is aware of these issues – though it has dealt with them with only mixed success.

ASC Governance Principles

The ASC's 'clearly stated position' regarding governance is detailed in its '*Governance Principles*⁷⁵'. The ASC Governance Principles contain six major principles relating to board composition, roles and powers,⁷⁶ board processes,⁷⁷ governance systems,⁷⁸ board reporting and performance,⁷⁹ member relationship and reporting⁸⁰ and ethical and responsible decision making.⁸¹ These major principles are in turn divided into separate 'sub-principles'. In this form the ASC Principles resemble the ASX Principles.⁸²

What follows in this section is a brief description of the content of the ASC Principles. Where relevant, and to place the ASC Principles in context, comparisons are drawn with the ASX Principles and with comparable regulation of for-profit corporations under the general law, the *Corporations Act* and the *ASX Listing Rules*.⁸³ There is a high level of conformity in the definition of 'governance' adopted by the ASC⁸⁴ and that adopted by the ASX.⁸⁵ Comparisons are able to be made between the two sets of principles free of any definitional

⁷² See below n 241.

⁷³ For example, the *Associations Incorporation Act 1981* (Vic) establishes duties of committee members of incorporated associations not to misuse their positions for their own financial advantage (section 29A) and limited conflict of interest duties (sections 29B and 29C). The *Associations Incorporation Act 2009* (NSW) contains similar duties (sections 31–3) and prohibits insolvent trading (section 68). See Deborah Healey, *Sport and the Law* (UNSW Press, 4th ed, 2009) 32–3.

⁷⁴ See *Corporations Act 2001* (Cth) Pt 2D.1.

⁷⁵ ASC Principles, above n 2, Principle 1.

⁷⁶ *Ibid* Principle 1.

⁷⁷ *Ibid* Principle 2.

⁷⁸ *Ibid* Principle 3.

⁷⁹ *Ibid* Principle 4.

⁸⁰ *Ibid* Principle 5.

⁸¹ *Ibid* Principle 6.

⁸² ASX Principles, above n 5. The eight ASX principles are divided into separate specific 'Recommendations'.

⁸³ Australian Securities Exchange, *Listing Rules* (31 March 2008) <http://www.asx.com.au/supervision/rules_guidance/listing_rules1.htm>.

⁸⁴ *Ibid* 1.

⁸⁵ ASX Principles, above n 8, 3.

confusion as both talk in terms of systems by which organisations are managed, the setting and achievement of organisational objectives, the optimisation of performance and monitoring and assessing risk.

Principle 1: Board Composition, Roles and Powers

Principle 1 Content

ASC Principle 1 is the most comprehensive of the ASC Principles. While disclaiming the advocacy of one particular governance structure, the Principle goes so far as to specify the type of required NSO entity,⁸⁶ the process for the appointment of the board, how member voting should occur,⁸⁷ and the size and composition of boards.⁸⁸ Only general similarities can be drawn with a comparable, though less prescriptive, ASX Principle.⁸⁹

The ASC Principles require that an NSO board of management exercise all powers of the organisation with the exception of powers that the Act or the NSO's constitution require to be exercised in general meeting.⁹⁰ The board is designated particular responsibilities including confirming the strategic directions of the organisation, the appointment and direction of the CEO, supervision of the financial and non-financial performance of the organisation and of the organisation's system of internal controls, risk management, director and board evaluation and regulatory compliance.⁹¹ The board is to be the 'mind' of the organisation and the chief executive officer (CEO) and staff to be the 'hands', with a clear separation between the two.⁹²

⁸⁶ NSOs are to be incorporated as companies limited by guarantee under the *Corporations Act 2001* (Cth): ASC Principles, above n 2, Principle 1.2. The company is to have a constitution and the general matters to be contained in the constitution are set out in the Principles: Principle 1.3.

⁸⁷ *Ibid* Principle 1.4.

⁸⁸ *Ibid* Principle 1.7.

⁸⁹ ASX Principles, above n 8, Principle 1: Lay solid foundations for management and oversight. ASC Principle 1.7 requires that all directors be independent and ASC Principle 1.12 provides that the chief executive officer will not normally be a director. In contrast, ASX Recommendation 2.1 only provides that a majority of the board should be independent directors and ASX Recommendation 2.3 merely provides that the roles of chair and chief executive officer should not be exercised by the same individual. No board size is specified by the ASX Principles. Section 201A of the *Corporations Act 2001* (Cth) merely provides that a proprietary company must have at least one director and a public company at least 3.

⁹⁰ ASC Principles, above n 2, Principle 1.1. The principal matter reserved by the *Corporations Act 2001* (Cth) to be exercised by the general meeting is the alteration of the organisations constitution (s 136). Other powers are reserved in sections 254H, 256B, 256C, Pt 2F.2, Pt 2B.7, sections 257D, 257C and 203D. Most of these exceptions relating to decisions concerning the company's shares: see Austin and Ramsay, above n 13, [7.080].

⁹¹ ASC Principles n 2 above, Principle 1.6. See for comparison the usual list of responsibilities of boards listed in the ASX Corporate Governance Principles in the Commentary to Recommendation 1.1: at 13. In contrast, section 198A of the *Corporations Act 2001* (Cth) merely provides that the business of a company is to be managed or under the direction of the directors.

⁹² *Ibid* Principle 1.5.

It is also a requirement that the majority of the board of directors be elected by the members of the organisation.⁹³ Boards are to comprise between five and nine directors – all of whom are to be independent⁹⁴ – and are to be structured to reflect specialist knowledge of the relevant sport and the sports industry and ‘the complex operating environment facing the modern sporting organisation’.⁹⁵ A board is to be broadly reflective of the organisation’s key stakeholders, butnot at the expense of the board’s skill mix. The ASC is concerned to advocate a board that has the necessary skills to carry out its governance role rather than a representative board.⁹⁶ In fact, the representative nature of NSO boards may compromise their long term sustainability by denying NSOs access to board members of sufficient skills.⁹⁷ The holding of state-level positions is considered to be a material conflict of interest for an office holder in a federal sporting structure.⁹⁸

The ASC Principles also require that the roles of individual directors are to be outlined by the board including the legal duties of directors to act in the interests of the members as a whole, act in good faith and for a proper purpose,⁹⁹ exercise due care and diligence, ensure that the organisation does not continue to carry on its business while insolvent¹⁰⁰ and meet the requirements of ‘various other federal and state laws that directly impact on the organisation’.¹⁰¹

Other roles of directors that are to be outlined by the boards of NSOs include a behavioural code of conduct, a process to deal with conflicts of interest, a register

⁹³ Ibid Principle 1.4. This requirement of the Principle is expressed unequivocally, although the Commentary and guidance notes merely put this as a ‘recommendation’: at 5.

⁹⁴ Ibid Principle 1.7. In contrast, ASX Recommendation 2.1 provides that a majority of the board should be independent directors: ASX Principles, n 8 above.

⁹⁵ Ibid Principle 1.7.

⁹⁶ Ibid Commentary and guidance to Principle 1.7: at 6. The Independent Sport Panel agreed that ‘the ‘state-based’ representation of directors on the boards of NSOs is a second-best form of governance, as well as embedding conflict of interest in the structure.’: Independent Sport Panel, *The Future of Sport in Australia*, above n 6, 104. While neither the case law nor the *Corporations Act 2001* (Cth) require directors to possess particular skills or qualifications, where the director does in fact have particular skills, the director is expected to use them: *Re Brazilian Rubber Plantations and Estates Ltd* [1911] 1 Ch 425. A special area of expertise possessed by a director does not relieve that director of the obligation to pay attention to matters outside the area of expertise: *Re Property Force Consultants Pty Ltd* (1995) 13 ACLC 1051, 1061. Directors of an NSO, like the directors of other companies, are also subject to an objective standard of skill and are obliged to inform themselves of the financial affairs of the company: *Statewide Tobacco Services Ltd v Morely* (1990) 2 ACSR 405 affirmed in *Morley v Statewide Tobacco Services Ltd* [1993] 1 VR 423; *Commonwealth Bank of Australia v Friedrich* (1991) 5 ACSR 115, 125; *Re Australasian Venezolana Pty Ltd* (1962) 4 FLR 60, 66.

⁹⁷ Salmar Burger, and Annaliese Goslin, ‘Compliance With Best Practice Governance Principles of South African Sport Federations’, (2005) 27(1) *South African Journal for Research in Sport, Physical Education and Recreation* 11. The movement towards independent ‘Commissions’ governing sports that has occurred in Australia was prompted by problems caused by individual committee members placing the interests of their individual clubs over the interests of the league: James B Perrine, ‘Conflicts in Australian Traditional Professional Sports Leagues: Rationalisation of Individual Clubs in the National Rugby League’, (2000) 7 *Competition and Consumer Law Journal* 266.

⁹⁸ ASC Principles, above n 2, 7.

⁹⁹ See *Corporations Act 2001* (Cth) s 181.

¹⁰⁰ See *Corporations Act 2001* (Cth) s 588G.

¹⁰¹ ASC Principles, above n 2, Principle 1.10.

of ‘related party transactions’¹⁰² and responsibilities for continuing professional development.¹⁰³ The roles of key positions are to be documented including the board chair, directors, company secretary, chairs of board committees and the CEO.¹⁰⁴ The issue of directors’ duties for NSOs is considered further below.

Principle 1 Issues

Principle 1 is more detailed in its requirements than the ASX Principles.¹⁰⁵ This Principle, and some of the following ASC Principles, are illustrative of a more generally applicable point: the ASC Principles tend to deal with internally focussed, administrative or managerial matters in contrast to the ASX Principles which are more focussed on transparency and disclosure, leaving matters of internal administration and the more mundane management processes to the discretion of the corporation. This means that for NSOs that are companies and thereby covered by the *Corporations Act 2001*, a range of matters covered by the ASC Principles are dealt with by the Act.¹⁰⁶ This duplication can only be partly explained by a possible objective on the part of the ASC to fill gaps left for NSOs that are incorporated associations under State legislation. This is because the ASC Principles also require NSOs to become companies limited by guarantee under the *Corporations Act 2001*.¹⁰⁷

Further, the provisions of ASC Principle 1 relating to the composition of boards go beyond the requirements of the *Corporations Act 2001* which imposes ‘few limits to the kinds of arrangements which the incorporators may choose to make for the appointment of directors.’¹⁰⁸

In addition, aspects of ASC Principle 1 have been criticised by the Independent Sport Panel. The Panel considered that the Principle embodies a ‘diminished view of the role of management’ in relegating it to act as the ‘arms’ of the organisation while the board performed the role of acting as the organisation’s ‘mind’. In a professional management environment, the role of the executive team is to drive the business, developing strategies and negotiating commercial arrangements with sponsors, governments and media organisations. In this case,

¹⁰² See *Corporations Act 2001* (Cth) Ch 2E.

¹⁰³ ASC Principles, above n 2, Principle 1.10.

¹⁰⁴ Ibid Principle 1.11. This Principle assumes that there will be a Chair of the board or a President but is silent on how a person is appointed to such a position. Section 248E of the *Corporations Act 2001* (Cth) is a replaceable rule that provides for the election of a chairperson by the directors.

¹⁰⁵ See ‘*Principle 1 content*’, above n 88.

¹⁰⁶ See for example *Corporations Act 2001* (Cth) Pt 2G – Meetings.

¹⁰⁷ See ASC Principle 1.2 and the discussion below in Part G *NSOs as Companies Limited by Guarantee*.

¹⁰⁸ Austin and Ramsay, above n 13, [7.170]. Section 201G of the *Corporations Act 2001* (Cth) provides that a company may appoint a person as a director by resolution passed in general meeting. However, this is a replaceable rule. The general meeting has an inherent power to direct the control of a company: *Worcester Corsetry Ltd v Witting* [1936] Ch 640, 650. The Act, the ASX Listing rules and fiduciary principles provide some limitations on the appointment of directors: see Austin and Ramsay, *Ford’s Principles of Corporations Law*, above n 13, 234–5. See also above n 96.

the role of the board is to appoint, support and challenge the executive team. The executive team should act as the ‘minds’ as well as the ‘arms’.¹⁰⁹

This premise is not appropriate in an era where the executive team has to be the initiator of strategy and change. It might be appropriate to a local sporting club where management is part-time or even volunteer. It is completely wrong in a professional environment where the executive team will be responsible for developing strategies and negotiating commercial arrangements with sponsors, governments and media organisations.¹¹⁰

A similarly scathing assessment was made of the ASC recommendation that the CEO of NSOs should not be a member of the board: ‘There is no reason for this rule. It is completely out of step with corporate practice.’¹¹¹ In contrast, the ASX Principles accommodate modern corporate practice by providing that companies should establish and disclose the respective roles of board and management. The ASX Principles advocate the establishment of a formal board charter detailing its functions and responsibilities and a formal statement of the areas of authority delegated to senior executives.¹¹² In addition to these criticisms, little guidance is provided in the ASC Principles on how NSOs are to achieve the recommended outcomes in the constitution of its board.¹¹³ Apart from the obvious difficulty of engineering the results of director elections, the pool of suitably qualified potential directors with both appropriate specialist knowledge and sufficient independence within a particular sport would be particularly narrow. The Independent Sport Panel proposed that the ASC should make funding conditional on the adoption of ‘appropriate and national skills-based governance structures’,¹¹⁴ though this recommendation has some inherent difficulties. It begs the question as to what may be appropriate in the circumstances of particular NSOs that have great disparity in character and activity.¹¹⁵

¹⁰⁹ Independent Sport Panel, *The Future of Sport in Australia*, above n 6, 25.

¹¹⁰ *Ibid* 25, 104.

¹¹¹ *Ibid*.

¹¹² ASX Principles, above n 8, Principle 1, Recommendation 1.1, 13.

¹¹³ ‘The federated system that prevails within most nonprofit sports organisations precludes the application of such a process’: Hoye & Cuskelly, above n 4, 78. Unlike the ASX Corporate Governance Principles (Principle 2.4), no nomination process is proposed or outlined in the ASC Principles. ASC Principle 1.8 encourages sports to develop a single strategic plan that applies to all levels within the sport.

¹¹⁴ Independent Sport Panel, *The Future of Australian Sport*, above n 6, 53. See also ASC Recommendation 4.2: ‘The Australian Sports Commission should make the adoption of appropriate and national skills-based governance structures that reflect the diversity of membership a funding condition for national sporting organisations.’

¹¹⁵ The requirement of the Panel’s recommendation that governance structures ‘reflect the diversity of membership’ of NSOs is understood to be targeted at addressing gender imbalances in the boards of NSOs: see Finding 28, Independent Sport Panel. *The Future of Australian Sport*, above note 6 at 101. To the extent that other types of diversity may be required, like State-based structures, this may compromise NSOs ability to select governance boards on the basis of skills. Beyond addressing gender imbalances, a requirement to provide for diversity has no automatic tendency to produce a board with the required skills and may merely result in the substitution of one inappropriate governance structure for another.

See the discussion below relating to the Specific Activities and Character of NSOs and note 259 below and accompanying text.

Principle 2: Board Processes

ASC Principle 2 is internally, administratively focussed. The board is to document its meeting process.¹¹⁶ Agendas are to be developed for each meeting¹¹⁷ and each meeting supported by appropriate documentation.¹¹⁸ Relevant information is to be provided to directors.¹¹⁹ This obligation is supported by the common law right of directors to inspect company documents.¹²⁰ There is also a statutory requirement under section 290 of the *Corporations Act 2001* for companies to make their financial records available in writing for inspection by a director at all reasonable times.¹²¹

Principle 2 also requires that boards plan their annual activities¹²² and that the board and each committee are to have a terms of reference or charter.¹²³

Principle 3: Governance Systems

ASC Principle 3 notes that the board is ultimately responsible for the success of the organisation it governs and provides that boards are to clearly define their role in discharging this responsibility.¹²⁴ The Principle requires that boards determine a process to develop the organisation's strategic direction, key objectives, performance measures, core values and the ethical framework.¹²⁵ A protocol is to outline expectations for board-management interactions.¹²⁶ In addition, a monitoring and evaluation system,¹²⁷ a risk management strategy and process,¹²⁸ a compliance system¹²⁹ and audit system¹³⁰ are to be implemented.

This ASC Principle also requires that the board establish an audit committee.¹³¹ Unlike the ASX Principles, there is no recognition in the ASC Principles of

¹¹⁶ ASC Principles, above n 2, Principle 2.1.

¹¹⁷ *Ibid* Principle 2.2.

¹¹⁸ *Ibid* Principle 2.3. See *Corporations Act 2001* (Cth) Pt 2G.1 and section 248C for replaceable rules regarding board of directors meetings.

¹¹⁹ *Ibid* Principle 2.4.

¹²⁰ *Fox v Gadsden Pty Ltd* (2003) 46 ASCR 713, 717.

¹²¹ See also *Corporations Act 2001* (Cth) s 198F which gives directors the right to inspect the books of the company for the purposes of legal proceedings.

¹²² ASC Principles, above n 2, Principle 2.5.

¹²³ ASC Principles, above n 2, Principle 2.6.

¹²⁴ *Ibid* Principle 3.

¹²⁵ *Ibid* Principle 3.1.

¹²⁶ *Ibid* Principle 3.2.

¹²⁷ *Ibid* Principle 3.3.

¹²⁸ *Ibid* Principle 3.4.

¹²⁹ *Ibid* Principle 3.5.

¹³⁰ *Ibid* Principle 3.7. This principle notes that the audit process 'may' include external processes. However, it is to be noted that Principle 4.5 explicitly requires external audit processes.

¹³¹ *Ibid* Principle 3.8. Like ASX Recommendation 4.3, ASC Principle 3.8 also requires that the audit committee's role be set out in a formal charter. Various requirements including the financial qualifications of the members of the audit committee and the requirement of the chair of the audit committee to be independent of the chair of the board are set out: ASC Principle 3.8.

the potential inefficiencies for smaller organisations of requiring a formal committee structure.¹³²

The CEO is to be subject to an annual or six-monthly performance review by the board¹³³ and the board is to clearly document all delegations of authority to the CEO and others.¹³⁴ The ASX Principles similarly allocate the responsibility for ‘monitoring senior executives’ performance and implementation of strategy’ to the board.¹³⁵ Again, illustrating the fundamental difference in approach between the two sets of principles, rather than prescribe a detail such as the frequency of performance evaluations, the ASX Principles leave this to the discretion of the company but require disclosure of the process utilised by the corporation for evaluating the performance of senior executives.¹³⁶ The ASC Principles do not share any similar disclosure obligation.

Principle 4: Board Reporting and Performance

ASC Principle 4 requires that each NSO have ‘a comprehensive reporting and performance management system in place to ensure organisational effectiveness and efficiency.’¹³⁷ Reporting is to include the provision of timely and accurate financial accounts to directors, essential for their effective decision making. Comprehensive and complete financial accounts are to be produced and be reviewed by an audit committee. The independence of the organisation’s external auditors is to be ensured.¹³⁸ This requirement reinforces the role of the audit as ‘one of the cornerstones of corporate governance’,¹³⁹ although these requirements are unsupported by any requirements to disclose how compliance has been achieved.

¹³² ASX Principles, above n 5, commentary to Principle 4.1, 25. The same allowance is made in respect of risk management and the establishment of a risk management committee: ASX Principles, above n 5, Commentary to Recommendation 7.2, 33.

¹³³ ASC Principles, above n 2, Principle 3.6. There is however no obligation equivalent to ASX Recommendations 1.2 and 1.3 which require the disclosure of the method of performance evaluation for senior executives.

¹³⁴ *Ibid* Principle 3.9.

¹³⁵ ASX Principles, above n 5, Commentary to Principle 1.1, 13.

¹³⁶ *Ibid* Recommendation 1.2. The Commentary to Recommendation 1.2 notes that performance should be ‘reviewed regularly against appropriate measures.’ It also recommends an induction process for senior executives to enable their early full and active participation in management decision making.

¹³⁷ ASC Principles, above n 2, Principle 4, 18. Specific issues dealt with by this ASC Principle include that the officers and directors are to be provided with appropriate insurance cover (Principle 4.1) and new directors are to undergo an appropriate induction process, (Principle 4.2). A comparable induction process is recommended in the commentary to ASX Recommendation 2.5. Directors are to be provided with access to independent professional advice if required (Principle 4.3). A similar right to access independent professional advice at the company’s expense is referred to in the commentary to ASX Recommendation 2.1. The board should receive regular, (preferably monthly) timely and accurate financial statements (Principle 4.4). The board is also to be debriefed annually by the organisation’s external auditor (Principle 4.5) and it should annually review and assess its own performance (Principle 4.6).

¹³⁸ *Ibid*.

¹³⁹ Cadbury Report, above n 13, 36 [5.1]. The failure of the audit function was one of the principal factors in the collapse of Enron: Jill Salomon and Aris Solomon, *Corporate Governance and Accountability* (John Wiley and Sons, 2004) 137.

Integrity in financial reporting is also dealt with by the ASX Principle but, again, rather than focusing internally on the provision of information to directors, the ASX Principles are concerned with the objective of ensuring 'the truthful and factual presentation of the company's financial position.'¹⁴⁰ As noted above, the ASX Principles also specify audit committee requirements¹⁴¹ as well as the information that is required to be disclosed by companies on the procedures for the selection and appointment of the external auditor.¹⁴²

Performance management under ASC Principle 4 is to include the review of the individual and collective performance of directors and the effectiveness of the chair. The ASX Principles similarly provide for the regular review of the performance of the board, although the ASX Principles deal with this through requiring disclosure of the evaluation process of the board, its committees and individual directors.¹⁴³ Like the ASC Principles, the ASX Principles deal with the issues of director induction and director access to continuing education and information.¹⁴⁴

Principle 5: Member Relationship and Reporting

The ASC Principles counsel the board to ensure 'it exercises leadership, integrity and good judgment, always acting in the best interests of the organisation as a whole, demonstrating transparency, accountability and responsibility to its members.'¹⁴⁵ Members are to be consulted and involved in the development of the sport's strategic plan and be involved in achieving the objectives of the plan, well-informed and actively participate in general meetings. Members are also to be 'regularly provided with timely and accurate disclosures on all material matters regarding the governance and performance of the organisation'.¹⁴⁶

¹⁴⁰ See ASX Principles, above n 8, Principle 4, 25. Similarly, ASX Principle 5 provides for the timely and balanced disclosure of all material matters concerning the company. This disclosure is externally focussed for the benefit of investors, rather than being what is effectively an internal management tool.

¹⁴¹ *Ibid* Recommendation 4.1, 4.2 and 4.3, 25–6.

¹⁴² *Ibid* Guide to reporting on Principle 4, 27. Information to be made publicly available includes information on the rotation of external audit engagement partners. The audit committee is also required to assess and report to the board on the performance of external auditors: Commentary to Recommendation 4.3. The ASC Principles do not provide any guidance on how the independence of external auditors is to be secured.

¹⁴³ ASX Principles, above n 8, Recommendation 2.5, 19. Nor is there any equivalent of ASX Recommendation 2.4 that the board should establish nomination committee or of ASX Recommendation 2.5 requiring the disclosure of the process of board and director evaluation. Similarly, there is no equivalent in the ASC Principles of the requirement under the ASX Principles for information to be disclosed regarding the level of compliance with ASX Principle 2.

¹⁴⁴ *Ibid*.

¹⁴⁵ ASC Principles, above n 2, Principles 5 and 5.1, 21.

¹⁴⁶ *Ibid* Principle 5, 21.

Similar matters are prescribed by ASX Principle 6, although by reference to shareholders rather than members.¹⁴⁷

The board's primary responsibility is one of trusteeship on behalf of its stakeholders, ensuring that the legal entity, the organisation, remains viable and effective in the present and for the future.¹⁴⁸

The members of NSOs are typically individual athlete competitors, coaches or officials or teams who are registered with the NSO directly or with a State/Territory Sporting Organisation or club affiliated to the NSO.¹⁴⁹ Two of the principal differences between members of NSOs and shareholders in a company are the different nature of the investment and the ability to switch investments. Shareholders invest for financial return. A member invests to participate in sport. 'If a shareholder is unhappy with the return or business or management practices, there is an effective market mechanism for transferring investments.'¹⁵⁰ A member of an NSO is more constrained in his or her ability to switch investments.

The members of an organisation are to have the power to remove board members or the board as a whole and change the constitution.¹⁵¹ This power is to be exercised in accordance with applicable legislation.¹⁵² This is consistent with the *Corporations Act 2001* which reserves to the general meeting the power to remove directors¹⁵³ and to amend the company's constitution.¹⁵⁴

Directors are to have no voting rights at general meetings to ensure 'a clear separation between the 'owners' and the 'governors' of the organisation'.¹⁵⁵ The normal rule applying under the *Corporations Act 2001* would give directors who are members a right to a vote and the votes of members would be of equal value.¹⁵⁶ However, this is a replaceable rule and alternative arrangements to give effect to the ASC Recommendation could be made by the company's constitution.

The board is required to provide members with a comprehensive annual report. The report is to contain sufficient financial information so that members can

¹⁴⁷ Respect the rights of shareholders: ASX Principles, above n 8, Principle 6, 27. The ASX Principles are also more detailed in recommending a communications policy to promote effective communication with shareholders and in considering the use of electronic communications, websites and effective use of shareholder meetings: ASX Principles, above n 8, see Commentary to Recommendation 6.1, 27–8.

¹⁴⁸ Commentary and Guidance to Principle 1.6: ASC Principles, above n 2, 6.

¹⁴⁹ *Ibid* 5.

¹⁵⁰ Julie A Foreman, *Corporate Governance Issues in a Professional Sport* (2001) <http://www.commerce.adelaide.edu.au/research/aaaj/apira_2001/papers/Foreman172.pdf>.

¹⁵¹ Section 136(2) of the *Corporations Act 2001* provides that a company's constitution may be altered by special resolution.

¹⁵² ASC Principles, above n 2, Principle 5.2.

¹⁵³ *Corporations Act 2001* (Cth) s 203D.

¹⁵⁴ *Corporations Act 2001* (Cth) s 136.

¹⁵⁵ *Ibid*.

¹⁵⁶ See *Corporations Act 2001* (Cth) s 250E.

make a judgement as to how effectively the board is fulfilling its role.¹⁵⁷ Of course for an NSO which is not a financially driven organisation, a financial report may throw little light on the effectiveness of the board in achieving the organisation's objectives.

The information to be disclosed by an NSO in an annual report is similar to some of the information required to be disclosed by companies subject to the ASX Listing Rules.¹⁵⁸ However, the ASC reporting requirement lacks the vigour of the continuous disclosure requirement embodied in the ASX Listing Rules¹⁵⁹ and the ASX Corporate Governance Principles.¹⁶⁰

Principle 6: Ethical and Responsible Decision Making

The ASC Principles charge boards with the responsibility of promoting ethical behaviour and decision making in their organisations.¹⁶¹ To give effect to this, boards are to establish a code of conduct setting out ethical and behavioural expectations for directors, the CEO and other senior management.¹⁶² This Principle resembles requirements of the ASX Principles, but again without any equivalent disclosure obligation on the part of NSOs.¹⁶³

To ensure responsible decision making, key decisions are to be assessed against the organisations risk management framework.¹⁶⁴ A business case is to be developed for each major project or significant event or activity prior to the commitment of resources. Worst-case scenarios are to be evaluated and mitigated against. The limited available resource of most sporting organisations leads the ASC to require the assessment of the capacity of the organisation to sustain a worst-case scenario loss.¹⁶⁵ This approach reflects a conservative approach to decision making that is unlikely to be reflected in the approach of profit motivated corporations. Certainly this conservative approach is not demanded by the ASX Principles.¹⁶⁶ The ASX Principles require a company to address risks that could have a material impact on its business, although it is noted that risk management policies should reflect the company's risk profile, take into account its legal obligations and the reasonable expectations of its stakeholders.¹⁶⁷

¹⁵⁷ ASC Principles, above n 2, Principle 5.4. See *Corporations Act 2001* (Cth) Ch 2M.

¹⁵⁸ ASX Listing Rules, above n 83, Ch 4.

¹⁵⁹ *Ibid*, Ch 3, in particular Rule 3.1.

¹⁶⁰ ASX Principles, above n 8, Principle 5.

¹⁶¹ ASC Principles, above n 2, Principle 6: Ethical and responsible decision making, 23.

¹⁶² *Ibid* Principle 6.1, 23.

¹⁶³ ASX Principles, above n 8, Principle 3 and Recommendation 3.1, 21.

¹⁶⁴ ASC Principles, above n 2, Principle 6.2, 23.

¹⁶⁵ *Ibid* Principle 6.3, 24.

¹⁶⁶ ASX Principles, above n 8, Principle 7: Recognise and manage risk, 32.

¹⁶⁷ *Ibid*. See also ASX Principles, above n 8, Recommendations 7.1, 7.2 and accompanying Commentary, 32–3. Listed companies are also subject to the requirements of section 295A of the *Corporations Act 2001* (Cth) that requires CEOs and CFOs to declare that the accounts of a company have been properly maintained, comply with accounting standards and give a true and fair view of the financial position of the company. ASX Recommendation 7.3 requires boards to disclose whether they have received an assurance from the CEO and CFO that the s295A declaration is based on a sound system of risk management and internal control.

The conservative position to risk taken by the ASC Principles seems to be based on a view of directors of an incorporated NSO as occupying a position analogous to that of trustees. The duties are not exactly the same however and this risk adverse position is not demanded for this reason. 'A trustee is ordinarily obliged to keep the trust property safe, while a director is required to supervise the management of the company in light of his or her position in commerce'.¹⁶⁸ Further, the business judgment rule would protect potentially risky board decisions from judicial review, provided they are made in good faith and for a proper purpose.¹⁶⁹

Directors' Duties

The utility of the requirement of the Principles for boards to outline the legal duties of directors is not apparent. It appears intended to have an educative objective,¹⁷⁰ though the list of applicable director's duties is technically incomplete¹⁷¹ and the capacity of NSOs to properly execute this educative task without expert assistance is open to question. It also appears that the ASC considers that the duties of directors of a company limited by guarantee are the same as those of a director of an incorporated association. While this may be generally correct in that in both cases directors would be in a fiduciary position,¹⁷² the statutory penalties including criminal sanctions available under the *Corporations Act 2001* in the case of directors of a company limited by guarantee are not generally available in respect of the directors of incorporated associations. This may be considered relevant by officers of an NSO in circumstances where the ASC is encouraging the establishment of the NSO as a company limited by guarantee. It is worthwhile considering how some of these duties may apply to directors of NSOs.

¹⁶⁸ Austin and Ramsay, above n 13, [8.050], 349–50. *Re International Vending Machines Pty Ltd* [1962] NSWLR 1408; *Mulkana Corp NL (in liq) v Bank of New South Wales* (1983) 8 ACLR 278; *Daniels t/as Deloitte Haskins & Sells v AWA Ltd* (1995) 37 NSWLR 438. Even in the cases where directors duties have been found to be analogous to those of trustees, the particular circumstances of the director are relevant: 'the question is what an ordinary person, with the knowledge and experience of the defendant might be expected to have done in the circumstances if he was acting on his own behalf.': *Australian Securities Commission v Gallagher* (1993) 10 ACSR 43, 53; See also *Permanent Building Society (in liq) v Wheeler* (1994) 14 ACSR 109, 155; *Overend & Gurney Company v Gibb* (1872) LR 5 HL 480, 486–7; *Re City Equitable Fire Insurance Company Ltd* [1925] Ch 407.

¹⁶⁹ *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL* (1968) 121 CLR 483, 493; *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821, 832. See also the statutory business judgment rule contained in section 180(2) of the *Corporations Act 2001* (Cth).

¹⁷⁰ ASC Principles, above n 2, the Commentary and guidance notes to ASC Principle 1.10, 9. 'It is critical that new directors are appropriately inducted to the board and the organisation and that they understand their roles within the organisation.'

¹⁷¹ For example, the duties imposed by the *Corporations Act 2001* (Cth) sections 182 and 183, not to misuse information or position are not included. A more complete and informative list of directors duties is found in Australian Sports Commission, *Governing Sport – The Role of the Board*, above n 7, 8–9.

¹⁷² *Elders Trustee and Executor Company Ltd v E G Reeves Pty Ltd* (1987) 78 ALR 193.

Duty to Act in the Interests of the Members as a Whole

One of the duties to be outlined is what is described as ‘the fiduciary duty of directors to act in the interests of the members as a whole and not to represent individual constituents.’¹⁷³ Using similar terminology to that used in the ASC Principles to describe the director’s duty to act on behalf of the members of the company, the oppression remedies provided by the *Corporations Act 2001* apply in relation to conduct that is ‘contrary to the interests of the members as a whole’.¹⁷⁴ However, the relevant equitable duty is a duty for directors to act in good faith in the interests of the company.¹⁷⁵ Similarly, the overlapping statutory duty is to act in good faith in the best interests of the company and for a proper purpose.¹⁷⁶ For the typical for-profit corporation, this duty to act in the interests of the company has been interpreted to principally require that directors consider the interest of the existing members of the company.¹⁷⁷ This is said to be ‘because they are the proprietors of the company who have risked their capital in the hope of gain,’¹⁷⁸ although the view that boards owe their duty to their shareholders as opposed to the company has been criticised:

This self-interested, tenacious and simplistic belief is corrosive of any effort to realise the deeper values companies are built upon, the wider purposes they serve, and the broader set of relationships they depend upon for their success.¹⁷⁹

Indeed, demands for more corporate social responsibility are credited with having been driven by concerns about the emphasis placed on ‘short-term profit maximisation.’¹⁸⁰

The ASC states that ‘it is a guiding principle of law that members must have the right to remove the board and change the constitution as they see fit, as they are ultimately the owners of the organisation’.¹⁸¹ However, in the case of NSOs, the ‘shareholder as owner’ rationale does not apply – the members of an NSO are not investors who have invested capital in the hope of profits. Whether this fact would allow a board to act for the benefit of other groups is not clear. It is suggested that while the members of an incorporated NSO may not share the same interest as shareholders who have risked their capital in the hope of financial gain, their interest as members, albeit for motives other than financial

¹⁷³ ASC Principles, above n 2, ASC Principle 1.10.

¹⁷⁴ *Corporations Act 2001* (Cth) Pt 2F.1 and s 461 (1)(e). See also *Wayde v NSW Rugby League Limited* (1985) 180 CLR 459.

¹⁷⁵ *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 69; *News Ltd v Australian Rugby League Ltd* (1996) 21 ACSR 635.

¹⁷⁶ *Corporations Act 2001* (Cth) s 181.

¹⁷⁷ See Austin and Ramsay, above n 13, [8.090]–[8.140].

¹⁷⁸ *Ibid* [8.095].

¹⁷⁹ Clark, above n 46, at 67-9, 279–85.

¹⁸⁰ Irene Lynch Fannon, ‘The Corporate Social Responsibility Movement and Law’s Empire: Is There a Conflict?’ [2007] 58 *Northern Irish Legal Quarterly* 1.

¹⁸¹ ASC Principles, above n 2, Commentary and guidance to Principle 5.2.

gain, may be considered at least as comparable as those of a shareholder in a for-profit corporation.

Nevertheless, it is open for the constitution of a company such as an incorporated NSO to provide that the board take into account groups other than the company's members or to advance a non-commercial purpose. As an example, the constitution of Athletics Australia includes the objects:

- (1) to be the Australian athletics association affiliated with the IAAF, the Australian Olympic Committee, the Australian Paralympic Committee and the Australian Commonwealth Games Association;
- (2) to establish and maintain cordial relations with other sporting bodies;
- (3) to improve the physical, mental and social well-being of the citizens of Australia through the encouragement and promotion of athletics, and the proper regulation of such activities;
- (4) to provide adequate representation of Australia in athletics at the Olympic Games, the Commonwealth Games and other international meetings; and
- (5) to act alone or with individuals or other bodies in the interests of sport and, in particular, athletics;¹⁸²

The Constitution requires that the income and property of the company is to be solely applied towards the promotion of these objects.¹⁸³

Good Faith and For a Proper Purpose

As the ASC Principles recognise, the law requires that 'Fiduciary powers granted to directors are to be exercised for the purpose for which they were given, not collateral purposes'.¹⁸⁴ When questions are raised as to the purpose for which powers have been exercised by directors, the courts will first ascertain the nature of the power and the purpose for which it was conferred.¹⁸⁵ In this analysis, the size and nature of the company will be significant.¹⁸⁶ It is not clear how the nature of an NSO would influence this consideration, although the character of an NSO as a company, its activities and its particular constitutional structure would be considered.¹⁸⁷ The constitution of an NSO could also provide guidance on the purposes for which powers are conferred.¹⁸⁸

¹⁸² Athletics Australia Ltd, *Constitution of Athletics Australia Ltd*, cl 3 <<http://www.athletics.com.au/inside/428/constitution>>.

¹⁸³ *Ibid* cl 4.

¹⁸⁴ *Permanent Building Society (in liq) v Wheeler* (1994) 14 ACSR 109, 137 (Ipp J with whom Malcolm CJ and Seaman J agreed).

¹⁸⁵ *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821.

¹⁸⁶ *Ibid*; Austin and Ramsay, above n 13, [8.210].

¹⁸⁷ *Australian Metropolitan Life Assurance Co Ltd v Ure* (1923) 33 CLR 199.

¹⁸⁸ *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285, 291.

Due Care and Diligence

Section 180 of the *Corporations Act 2001* sets out the statutory standard of care and diligence required of directors.¹⁸⁹ This standard is essentially the same as the equivalent legal duty.¹⁹⁰ The degree of care and diligence to be exercised by a director of an NSO is that of a reasonable person who was a director of the company in the company's circumstances and occupied the same office as the director. In considering whether this duty has been breached, the court will have regard to the company's circumstances and the position occupied by the director.¹⁹¹ Matters such as the size of the company and whether the director or officer is a full-time senior manager of a non-executive director are taken into account.¹⁹² While the standards of skill and diligence required by the courts are not high, there are increasing expectations for directors. Directors will be expected to attend board meetings¹⁹³ and to be involved in the management of the company.¹⁹⁴

Insolvent Trading

The duty to prevent insolvent trading is contained in section 588G of the *Corporations Act 2001*. The duty is imposed only on directors, who may be held personally liable for the debts incurred by an insolvent company. This duty may have more of an effect in dissuading potential directors of an NSO from serving in that capacity than in the case of for-profit companies due to the fact that NSO directors will generally be unpaid volunteers.

Conflicts of Interest

Directors¹⁹⁵ of NSOs as fiduciaries must avoid placing themselves in a position in which they may prefer their own interests or the interests of a third party over the interests of the NSO.¹⁹⁶ This is a requirement under equitable principle

¹⁸⁹ This duty is also owed by officers of the company such as the CEO.

¹⁹⁰ *Re HIH Insurance Ltd (in prov liq)*; *ASIC v Adler* (2002) 41 ACSR 72 (appeal largely dismissed); *Adler v ASIC* (2003) 46 ACSR 504; *Daniels t/as Deloitte Haskins & Sells v AWA Ltd* (1995) 37 NSWLR 438; *ASIC v Vines* (2005) 55 ACSR 617: the company chairman was held to have special responsibilities beyond those of other directors because of the positions he held (chairman of the board and of the finance and audit committee) and his qualifications (chartered accountant), experience and expertise (substantial financial experience as a CFO and as a finance director of other companies). See Austin and Ramsay, above n 13, [8.330].

¹⁹¹ *Australian Securities and Investments Commission v Rich* (2003) 21 ACLC 450; *Australian Securities and Investments Commission v Rich* (2004) 22 ACLC 1232.

¹⁹² *AWA Ltd v Daniels t/as Deloitte Haskins & Sells* (1992) 7 ACSR 759. Under the ASC Principles, all directors are to be non-executive.

¹⁹³ *Vrisakis v ASC* (1993) 9 WAR 395.

¹⁹⁴ *DCT v Clark* (2003) 57 NSWLR 113.

¹⁹⁵ The equitable fiduciary duty is also owed by senior executives and some of the statutory duties apply to directors only (eg sections 191–196), some apply not only to directors and senior executives, but also to ordinary employees (eg sections 182, 183) and to directors relatives (eg section 228).

¹⁹⁶ *Bray v Ford* [1896] AC 44. 51; *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41.

and under the *Corporations Act 2001*.¹⁹⁷ Generally, the duty to avoid conflicts of interest is owed to the NSO, and not to individual members or others such as creditors or employees.¹⁹⁸ However, special facts may exist where a fiduciary duty is owed by directors to individual members.¹⁹⁹ Significantly for NSOs with a representative board structure, '[w]here the directors are nominees of a section of shareholders and are appointed to represent their interests on the board, it would seem that a fiduciary obligation to those shareholders ought readily be found.'²⁰⁰

The ASC Principles and NSOs: Issues

The Accountability Rationale for the ASC Governance Principles

NSOs are required by the ASC to adopt the ASC's Governance Principles in order to be recognised as an NSO and to thereby qualify for funding.²⁰¹ To the extent that the ASC rationalises its insistence on the adoption of its Governance Principles by reason of the necessity to ensure accountability for the expenditure of taxpayer funds, this can only be a partial justification. This accountability could be achieved in a variety of ways. A host of grants and payments are made by governments to organisations without the imposition of good corporate governance requirements. Reporting and auditing requirements attached to funding could just as easily achieve this accountability objective.

In addition, the ASC's requirements for funding go much further than mere accountability for taxpayer funds. They prescribe the very nature of the organisation (a company limited by guarantee), its internal structure, the responsibilities of the organisation's bodies and officers and its internal processes. In reality, the ASC, through its criteria for funding and in the name of accountability, while lacking any specific power over NSOs, indirectly seeks to exercise substantial control over the NSOs.

The Objectives of 'Governance'

In considering the ASC Principles, it needs to be recognised that corporate governance principles were, by definition, developed in the context of the nature of corporations, particularly by reference to the relationships that exist within corporations between a company's board, its shareholders and other stakeholders.

¹⁹⁷ *Corporations Act 2001* (Cth), sections 182 and 183 (duty not to misuse information or position), 191 and 195 (requirement to disclose certain interests). See also Ch 2E (re benefits to related parties), Part 2D.2 Div 2 (re director retirement benefits) and Part 7.10 Div 3 (re insider trading).

¹⁹⁸ Austin and Ramsay, above n 13, [9.050].

¹⁹⁹ *Glavanics v Brunninghasuen* (1996) 19 ACSR 204 (upheld on appeal: *Brunninghasuen v Glavanics* (1999) 46 NSWLR 538); *Mesenberg v Cord Industrial Recruiters Pty Ltd (Nos 1 & 2)* (1996) 19 ACSR 483; *Peskin v Anderson* [2001] BCLC 372.

²⁰⁰ Austin and Ramsay, above n 13, [9.052].

²⁰¹ Australian Sports Commission, *Eligibility Criteria for the Recognition of National Sporting Organisations by the Australian Sports Commission 2009-2013*, above n 3.

Yet, there is no necessity for NSOs to be corporations. Many have been, and continue to be, incorporated associations.²⁰² There may be good reasons based in sound organisational management and administration for the adherence by NSOs to governance principles developed in the context of corporations. The causes of poor governance in sporting organisations identified by the ASC of director inexperience, conflicts of interest, failure to manage risk, inadequate or inappropriate financial controls, and generally poor internal business systems and reporting²⁰³ may plainly justify some type of attempted remedial action by the ASC as part of the organisation's role of leadership in the development of sport. Any such remedial action should nevertheless be properly tailored to the circumstances of NSOs. Questions of relevance, appropriateness and effectiveness arise from the inflexible or unquestioning application of principles derived from and developed in a different context.

It may also be that the ASC requirement for NSOs to be companies limited by guarantee is an indirect method to mould NSOs so that the ASC's insistence on the application of its corporate governance principles becomes more relevant and justifiable. It remains the case that an adherence to sound management principles does not necessarily require the constitution of NSOs as corporations.

A further reason for the ASC's 'company limited by guarantee requirement' may be that any possible Constitutional limitations on the application of the Commonwealth's powers to associations incorporated under State legislation are resolved. The NSOs as corporations become subject to the control and regulation of the Australian Securities and Investments Commission with its investigatory and enforcement powers.

Finally, it is to be observed that, depending upon the business conducted by NSOs, there may be significant taxation and stamp duty implications arising from the conversion of an NSO from an incorporated association under State law to a company limited by guarantee under the *Corporations Act 2001*. Legislative assistance to facilitate this conversion may be justified.²⁰⁴

Objectives and Focus of ASC and ASX 'Governance Principles'

Perhaps not surprisingly given their different context, the ASX Principles and Recommendations have a different focus.

The ASC considers governance to be concerned with three key issues. The first is how an organisation develops strategic goals and direction. The second

²⁰² See below n 249.

²⁰³ See above n 43.

²⁰⁴ See for example *Private Health Insurance Legislation Amendment Act 2008* (Cth) in relation to stamp duty problems arising for private health insurers on their conversion to companies limited by guarantee under the *Corporations Act 2001*.

governance issue is how the board of an organisation monitors organisational performance to ensure it achieves its strategic goals, has effective systems and meets its legal and regulatory obligations and the third key issue of governance concern is ensuring that the board acts in the interests of its members.²⁰⁵ Its Governance Principles are designed to ensure more effective decision making in sporting organisations.²⁰⁶ Their purpose is to assist in the implementation and maintenance of a robust system of governance appropriate to the needs of the particular sport, to provide the mechanisms for the establishment and maintenance of an ethical culture in sporting organisations through a self-regulatory approach and to provide benchmarks against which to assess the performance of NSOs.²⁰⁷

The ASX Principles on the other hand are concerned with the effect of corporate governance practices in Australia on the cost of capital in a global capital market, the international competitiveness of Australian companies and the promotion of investor confidence.²⁰⁸

One factor that is perhaps reflective of the different context in which the two sets of principles operate is the substantive difference in the way the Principles approach risk. As noted above, the ASC Principles may fairly be characterised as ‘risk adverse’²⁰⁹ while the ASX Principles on the other hand recognise the entrepreneurial nature of corporations.²¹⁰ Another general observation also noted above is that the ASC principles are inwardly focussed, prescribing internal processes, functions and structures. The ASX principles on the other hand are focussed on the relationship of the company with the external world.²¹¹

Despite the differences of focus, both sets of Principles are mindful of the implications of good governance which extend beyond the entities directly involved. Ineffective governance practices in the sporting sphere impact on the sport concerned as well as ‘undermine confidence in the Australian sports industry as a whole.’²¹² The ASX Principles note the effect for Australian

²⁰⁵ ASC Principles, above n 2, 1.

²⁰⁶ Ibid 2.

²⁰⁷ Ibid 1.

²⁰⁸ ASX Principles, above n 8, 4. See Christine Mallin, above n 15, 1.

²⁰⁹ ASC Principles, above n 2: While the opportunity cost of not doing activities is recognised (Commentary and Guidance to Principle 3.4, 15), Principle 6.3 requires that worst-case scenarios be evaluated and ‘mitigated/managed by the organisation’, a standard more stringent than that likely to be adopted by most commercial corporations. Principle 7.1 recommends that companies ‘establish policies for the oversight and management of material business risks and disclose a summary of those policies.’: at ASX Principles, above n 8.

²¹⁰ ASX Principles, above n 8, 3: ‘Effective corporate governance structures encourage companies to create value, through entrepreneurialism, innovation, development and exploration, and provide accountability and control systems commensurate with the risks involved.’

²¹¹ Illustrative of this is the difference between the continuous disclosure regime required by ASX Recommendation 5.1 as compared with ASC Principle 5.4 that merely requires boards to provide members with a comprehensive annual report. As noted above n 107, a partial explanation for this may be a desire by the ASC to fill gaps left by the State incorporated associations legislation.

²¹² ASC Principles, above n 2, 2.

companies of corporate governance structures and practices ‘in determining the cost of capital in a global capital market.’²¹³ It would be self-justificatory of the ASC Principles for any analogy to be drawn between the adverse effect on corporations of poor governance practices on their ability to raise capital with the adverse effect for NSOs on their ability to secure funding or ‘capital’ from the ASC.

Prescription v Disclosure

Transparency is an essential element of a well-functioning system of corporate governance. Corporate disclosure to stakeholders is the principal means by which companies can become transparent.²¹⁴

There is a significant divergence in the approach to disclosure of the ASX and ASC principles. The ASX Principles largely operate through requiring disclosure of the governance processes established by companies in accordance with the Principles. Not only are the required processes, policies, codes, and other specified information to be disclosed, so are the details of any relevant departures from the Recommendations.²¹⁵ In this way, a detailed picture can be obtained of the governance arrangements of a listed company.

In contrast, the ASC Principles contain very few requirements for the disclosure of governance processes or information.²¹⁶ The ASC Principles appear to rely on a prescriptive approach but without any regime that either discloses or requires compliance. This not only raises questions as to the effectiveness of the Principles in securing observance amongst NSOs, the lack of proper disclosure requirements fundamentally compromises the value of the governance scheme established by the ASC Principles. Improvement of disclosure and transparency has been ‘one of the most important aims of corporate governance reform worldwide’.²¹⁷ In fact, ‘Disclosure has long been recognised as the dominant philosophy of most modern systems. It is a *sine qua non* [essential aspect] of corporate accountability.’²¹⁸ The absence of a disclosure regime is a striking omission from the ASC Principles.

²¹³ ASX Principles, above n 5, 4. It may be that for NSOs, an analogy can be drawn between the adverse effect on corporations of poor governance practices on their ability to raise capital with the adverse effect for NSOs on their ability to secure funding or ‘capital’ from the ASC.

²¹⁴ Salomon and Solomon, above n 131, 11.

²¹⁵ See ASX Principles above n 8, 1.1, 1.2, 1.3, 2.5, 2.6, 3.1, 3.2, 3.3, 4.4, 5.1, 5.2, 6.2, 7.1, 7.2, 7.3, 7.4, and 8.3.

²¹⁶ See ASC Principles, above n 2, Principle 1.1 which advocates the disclosure of management powers but which does not specify to whom or how this disclosure is to be made and Principle 5.4 which requires members to be provided with an annual report. One of the matters to be disclosed in the annual report is information on ‘governance structures and policies. No detail or guidance as to what information of this category is to be disclosed is provided. Principle 1.10 refers to the disclosure of conflicts of interest but does not appear to be intended to require more general or public disclosure of such matters.

²¹⁷ Salomon and Solomon, above n 131, 120.

²¹⁸ Farrar and Hannigan, 1998, quoted in Salomon and Solomon, above n 139, 120.

Flexibility of Application

The ASC notes that ‘different sporting organisations operate under different governance structures’ and claims not to advocate ‘the adoption of any single model’.²¹⁹ This point is elaborated upon in the ASC’s guideline *Governing Sport – The Role of the Board*:

There is no single best structure for boards, that is, ‘one size does not fit all’. The organisation’s members should determine which structure and composition best fit their needs and, with awareness of general principles of good governance, create a board that meets the challenges facing the organisation of the sport.²²⁰

Similarly, the ASX Principles disavow a ‘one size fits all’ approach.²²¹ It has been observed that company law ‘endeavours to deal with all companies by a single set of principles, and yet the differences between a large national or multinational company and a small family investment company seems much more profound than their similarities.’²²² Nevertheless, the system of corporate regulation works because it is more facultative than prescriptive.²²³ Consistent with this, the ASX Principles deal with this diversity through the flexibility of the ‘if not, why not’ approach.²²⁴

The ASC Principles attempt to reflect this approach by what is described as the ‘obligation for all sporting organisations to explain to stakeholders if any alternative approach to the best-practice principles is adopted (the ‘if not, why not’ obligation).’²²⁵ However, as the above analysis of the ASC Principles shows, the ASC’s Principles lack any actual reporting or other obligation relating to the application or adoption of the Principles by an NSO.²²⁶ The ASC’s approach therefore appears to be an empty imitation of the ASX ‘if not, why not’ approach. More significantly, the ASC Principles appear to lack any capacity for modification or flexible application by NSOs. The Principles are frequently expressed in absolute language and not in a way that provides for any alternatives to the recommendations. Despite its claim not to be advocating

²¹⁹ ASC Principles, above n 2, Principle 1, 3.

²²⁰ Australian Sports Commission, *Governing Sport – The Role of the Board* (2005) 28 <http://www.ausport.gov.au/__data/assets/pdf_file/0019/205813/Governing_Sport.pdf>.

²²¹ ASX Principles, above n 8, 5.

²²² Austin and Ramsay, above n 13, [7.040].

²²³ *Ibid* 94.

²²⁴ ASX Listing Rule 4.10.3, above n 83, requires companies to provide a statement in their annual report disclosing the extent to which they have followed the Corporate Governance Recommendations and to identify any Recommendations not followed and to give reasons for non-compliance. Under the ASX Recommendations, there is no flexibility for companies in the top 300 of the S&P All Ordinaries Index to choose not to follow the Recommendation relating to the establishment of audit committees: ASX Listing Rule 12.7.

²²⁵ ASC Principles, above n 2, 1.

²²⁶ It is perhaps an omission that the level of compliance with the ASC Principles is not listed as a matter that NSO boards are required to report on in the annual reports prepared in accordance with Principle 5.4.

a single model, the Principles endorse one relatively detailed and prescriptive governance model.

The consequences of this inflexibility may be that organisations will be forced to adopt inappropriate or unwanted corporate structures or that they will simply choose not to observe the ASC's Principles. Both consequences are liable to undermine the status and effectiveness of the Principles. Some indication of the elections being made by NSOs is given by the observance of the recommendation for NSOs to constitute themselves as companies limited by guarantee. This is discussed further below.

The Specific Activities and Character of NSOs

Differences between NSOs

Two of the features of NSOs that influence the application and relevance of corporate governance principles to them are first, that there is a wide variety in the size and type of NSO. They include the peak organisations of sports with large participation numbers and extensive organised competitions across all or a number of States. Examples of such organisations include the Australian Football League, Football Federation Australia and the Australian Rugby League. At the other end of the spectrum are the relatively small organisations with low participant numbers and little or no commercial operations, for example Archery Australia, Bocce Federation of Australia and Croquet Australia.

It has been argued that 'attempts to understand organizational governance in the wider corporate and non-profit sectors have suffered from using a single perspective'.²²⁷ Similarly, attempts to understand the governance of NSOs as a group may suffer from the application of a single perspective. While all NSOs may notionally be not-for-profit organisations, the governance arrangements for an NSO that engages in commercial activities that include selling broadcast rights to its national competition for \$780 million for five years²²⁸ and which generates \$285m in annual revenue²²⁹ may need to be very different to an NSO with no real commercial income and which is virtually wholly dependent upon membership revenue and funding from the ASC.

Different activities within NSOs

The second influencing feature is that an NSO may be multifaceted in its nature and activities. An NSO may operate both as the governing body of its sport

²²⁷ Chris Cornforth, 'Introduction: the changing context of governance – emerging issues and paradoxes' in Chris Cornforth (ed) *The Governance of Public and Non-profit Organizations: what do boards do?*, (Routledge, 2003) 11; Hoye and Cuskelly, above n 4, 15.

²²⁸ Mary Gearin, 'Seven, Ten snatch AFL broadcast rights' (5 January 2006) Australian Broadcasting Commission <<http://www.abc.net.au/7.30/content/2006/s1542538.htm>>.

²²⁹ Courtney Walsh, 'AFL boss Demetriou in a class of his own', *Weekend Australian* (Australia), 1 March 2008, 57.

but also as the organiser or owner of a national league competition involving significant commercial activities.²³⁰ The activities of an NSO in governing its sport to provide participation and organised competition opportunities, to advance the sport, with revenues reinvested in the sport, places the NSO in the same camp as the traditional not for profit, public service delivery type of organisation. At the same time, it is difficult to substantively distinguish the commercial operations of a national competition such as the AFL or the National Rugby League from the activities of a typical for-profit enterprise merely from the fact that the profits from the revenue generated from the commercial operations of NSOs are not paid out as dividends to shareholders but retained within the sport. The sports nevertheless are engaged as participants in commercial markets in competition with for-profit companies and with each other.²³¹

No greater lenience or lesser standard of governance should apply to the commercially active NSO than would be expected of a standard corporation carrying out activities of the same character and scale merely because the NSO is technically a not-for-profit organisation. Yet, because of its multifaceted nature, an NSO of this character confronts difficult governance issues. The stakeholders and issues involved in the traditional activities of an NSO in the governance of its sport such as maximising participation, building pathways from junior to elite sport, ensuring that the sport at the grass-roots level develops and ensuring that those involved at that level are supported are very different to the stakeholders and issues involved in the operation of a commercial, elite national competition.

²³⁰ The Independent Sport Panel report found a 'problem facing many NSOs is that they have given little thought to the strategic 'end game' that they are playing. Is it simply to win medals or achieve elite success in international competition? Or is it also to find ways to grow community participation and also secure commercial benefits from growing that participation base?': Independent Sport Panel, *The Future of Sport in Australia*, above n 6, 104.

²³¹ In respect of football leagues in Australia, the question has arisen in the context of competition law whether each league is in its own market or is part of a market that includes other football codes, and perhaps other sports. Gleeson CJ in dicta in *News Limited v South Sydney District Rugby League Club Ltd*, (2003) 215 CLR 563, 569 [5] said 'Perhaps issues of market definition were thought to arise. Rugby league is only one form of sporting contest competing for the attention of the public. In fact, that is one of the reasons why the rivalry between the News and the ARL competitions was so damaging.' Burchett J, the trial judge whose decision was overturned on other grounds in *News Ltd v Australian Rugby League* (1996) 64 FCR 410, found a four sport product market consisting of rugby league, rugby union, Australian rules and basketball: *News Ltd v Australian Rugby League* (1996) ATPR 41-466. It appears accepted that in some respects and at least amongst the football codes themselves, the different sports are in competition with each other. Indeed, this competitive rationale has formed the motivation for the establishment and subsequent expansions of football codes in Australia: See Australian Rugby, 'About the competition', <http://www.rugby.com.au/fixtures_results/investec_super_14/about_the_competition,21996.html>; 'AFL expansion: 18 is enough?' (18 February 2008) <www.realfooty.com.au/news/afl-expansion-18s-enough/2008/02/18>; NRL News, 'Robina Stadium key to NRL's future' (23 January 2008) <<http://www.nrlnews.com/2008/01/23/robina-stadium-key-to-nrls-future/>>; Andrew Demetriou, 'Two into Sydney a nice fit', *Herald Sun*, Melbourne, 9 September 2008; Michael Lynch, 'A-League may beat AFL to the punch', *Real Footy* (1 November 2007) <<http://www.realfooty.com.au/news/news/a-league-may-beat-afl-to-the-punch/2007/10/31/1193618974553.html>>.

Even in the nascent stage of an organisation's development, growing professionalism in sporting organisations and their transformation from a volunteer based to professional management has been identified as a source of difficulty in applying traditional governance variables. Tensions arise with the movement of control from volunteer boards to professional management.²³² Governance problems do not necessarily dissipate and may widen with the continued professionalisation and commercialisation of organisations.²³³ It has been observed that if a 'sport wants to build a national commercial franchise as well as a strong national talent pool and pathways, it should develop governance structures that separate the elite and professional programs from community level programs.'²³⁴ What such a structure would look like remains unclear.²³⁵

One of the stated purposes of the ASC Principles is to assist in the implementation of 'a robust system of governance that fits the particular circumstances of [the] sport.'²³⁶ However, the difficulties raised by the universal application of a single set of corporate governance principles to NSOs with disparate structures and characters are not addressed. Little flexibility or guidance in the application of the Principles to organisations of different characters is provided. By way of illustration, in one of the few places where organisational differences are recognised, the Commentary and Guidance to the Principle dealing with conflicts of interest²³⁷ refers to different types of NSO structures in the context of conflicts of interest. Here differences such as federal sporting structures comprised of State level members, unitary sporting structures with direct relationships with 'individual members and/or their clubs' and sporting organisations of a 'predominantly business-owner nature' are noted but only for the purpose of identifying the source of potential conflicts of interest. This represents only a superficial consideration of the application of governance principles in light of the varying nature of NSOs. NSOs may feature more than one of the characteristics identified and may engage in a variety of activities involving State level bodies, individual members, clubs and business-owner enterprises. However, as the next area of discussion shows, notwithstanding the failure of the ASC Principles to address these issues, a degree of self-selection

²³² Ferkins, Shilbury & McDonald, above n 34, 198–204, 208–213; Hoye and Cuskelly, above n 4, 148.

²³³ A recent example is the difficulties experienced by the NSO 'Basketball Australia' in its attempts to merge its general federally structured operations with its separately structured national basketball league, a league that involves commercial, privately owned team franchises: Australian Sports Commission, *Big basketball review recommendations released* (30 January 2008) <http://www.ausport.gov.au/media/releases/big_basketball_review_recommendations_released>; Basketball Review Steering Committee Report, *Structure and Governance Review of Basketball in Australia* (November 2007) <http://admin.nbl.com.au/site/_content/document/00005880-source.pdf>; Mike Horan, *Basketball Australia opts to go ahead with revamped NBL* (12 May 2009) <<http://www.news.com.au/perthnow/story/0,21598,25467615-5005401,00.html>>.

²³⁴ Independent Sport Panel, above n 6 at 24.

²³⁵ *The Future of Australian Sport* recommended a skills based governance board but did not provide any specific guidance on this separation of the elite, commercial activities of NSOs from their community programs.

²³⁶ ASC Principles, above n 2, 1.

²³⁷ ASC Principles, above n 2, Principle 1.7.

may be taking place amongst NSOs in terms of those elements of the ASC Principles that are adopted.

NSOs as Companies Limited by Guarantee

As noted above,²³⁸ ASC Principle 1.2 requires that NSOs be incorporated as a company limited by guarantee under the *Corporations Act 2001*. Strictly, the only governance structure that is consistent with the ASC's Principles requires NSOs to be companies limited by guarantee.²³⁹ This would appear to require those NSOs that are incorporated associations upon being recognised by the ASC to subsequently incorporate. Although the apparently definitive requirement of Principle 1.2 is confusingly qualified by a more equivocal statement in the 'Commentary and guidance' notes accompanying the Principle. Noting that 'there can be arguments for the adoption of various legal structures, ... the ASC encourages national sporting organisations to adopt a company limited by guarantee structure.' (emphasis added).²⁴⁰

The essential features of a company limited by guarantee are that the members are not shareholders and their liability is limited to the contribution of the amount agreed to be contributed on a winding up of the company.²⁴¹ 'The form of a company limited by guarantee has some administrative advantages, simplifying procedures for admission to membership and avoiding the costs and procedural requirements involved in dealing with issued shares.'²⁴²

While these are the essential features of a company limited by guarantee, the reasons for the ASC to require NSOs to be companies limited by guarantee are not detailed in the Principles.²⁴³ One of the reasons that is advanced is the requirement under the *Corporations Act 2001* for incorporated associations which trades outside its State or Territory of origin to register under the *Corporations Act 2001*.²⁴⁴ While it is true as the ASC states that this registration 'imposes additional administrative requirements on the organisation', these requirements are minimal and would appear to be insufficient to justify the specification by the ASC of the constitutional form of NSOs.²⁴⁵

²³⁸ See above n 86.

²³⁹ ASC Principles, above n 2, Principle 1.2.

²⁴⁰ Ibid 3. See also Australian Sports Commission, *Governing Sport – The Role of the Board*, above n 7, 27.

²⁴¹ *Corporations Act 2001* (Cth) s 517. See also the section 9 definition of 'company limited by guarantee'.

²⁴² LexisNexis Butterworths, *Australian Corporation Law Principles and Practice*, [1.2.0200]: 'However, the absence of share capital will make it difficult for a company limited by guarantee to raise finance.'

²⁴³ Some further explanation is found in Australian Sports Commission, *Governing Sport – The Role of the Board*, above n 7, 27, although this is by no means comprehensive or detailed.

²⁴⁴ This is the effect of *Corporations Act 2001* (Cth) s 601CA.

²⁴⁵ See *Corporations Act 2001* (Cth) Pt 5B.2 and Pt 2D.6, s 206HA.

The more substantive justification lies in what the ASC describes as the provision by the *Corporations Act 2001* of ‘a very robust and structured platform for the operation of organisations and provides clarity in areas otherwise silent within the *Association Incorporation Act*.’²⁴⁶ In other words, it appears that the ASC considers that the *Corporations Act 2001* provides a more supportive framework for the good governance of NSOs. It may be assumed that the more extensive reporting, financial and legal obligations contained in the *Corporations Act 2001* are the basis for this view, although a more substantive and detailed justification could reasonably be expected of the ASC on this fundamental issue.²⁴⁷

The more equivocal interpretation of the Principle noted above appears to reflect the reality, with many current NSOs remaining as incorporated associations under State and Territory legislation²⁴⁸ rather than becoming incorporated as companies limited by guarantee. Of the 81 NSOs recognised by the ASC as at 7 October 2008, 47 were incorporated associations and 23 were companies limited by guarantee.²⁴⁹

It is suggested that some self-selection on this matter appears to be occurring amongst NSOs. While only a minority of the NSOs recognised by the ASC are companies limited by guarantee rather than incorporated associations, those sports with significant national or professional competitions or commercial interests are all companies limited by guarantee.²⁵⁰ This fact points to a real divergence in the governance systems considered appropriate by NSOs themselves according to their level of commercial activity. This factor also appears to be self selection rather than a product of ASC actions. ASC funding does not appear to be driving this behaviour as a number of the ‘company limited by guarantee’ NSOs receive only relatively small amounts of funding from the ASC²⁵¹ whereas other NSOs that continue to be incorporated associations receive comparatively large funding

²⁴⁶ ASC Principles, above n 2, Commentary and Guidance to Principle 1.2.

²⁴⁷ The other possible reasons for this requirement of establishing Constitutional certainty for Commonwealth legislative and providing for ASIC regulation are discussed above at pages 21, 22.

²⁴⁸ See *Associations Incorporation Act 1981* (Vic); *Associations Incorporation Act 2009* (NSW); *Associations Incorporation Act 1981* (Qld); *Associations Incorporation Act 1985* (SA); *Associations Incorporation Act 1987* (WA); *Associations Incorporation Act 1964* (Tas); *Associations Incorporation Act 1991* (ACT); *Associations Act* (NT).

²⁴⁹ The status of 11 was not able to be determined. This information was compiled from information published by the Australian Sports Commission in relation to the NSOs that it recognises (see Australian Sports Commission, *National Sporting Organisations recognised by the Australian Sports Commission (as at 7 October 2008)*, <http://www.ausport.gov.au/_data/assets/pdf_file/0008/238985/Recognised_NSO_and_NSODs_as_at_7_October_2008.pdf> and the Constitutions of each of those NSOs (where available), or information obtained from each organisation’s website or annual report.

²⁵⁰ This group includes Athletics Australia, the Australian Football League, Football Federation Australia, Golf Australia, Hockey Australia, Confederation of Australian Motor Sport, Motorcycling Australia, Netball Australia, Australian Rugby League, Australian Rugby Union and Swimming Australia.

²⁵¹ For example Rugby Union, the motor sports organisations, and the AFL: Australian Sports Commission, *NSO 2009/10 Grants and Allocations*, above n 1.

allocations.²⁵² One could expect the level of ASC influence and compliance with the ASC's preferred governance model to be commensurate with its funding. However, this does not appear to be the case.

It remains to mention one potential consequence of the incorporation of NSOs as companies limited by guarantee rather than as incorporated associations which is not explored by the ASC. This factor is a potential increased exposure for companies limited by guarantee to court intervention in internal disputes as compare with incorporated associations. The general rule has been that 'the Courts do not interfere in the contentions or quarrels of political parties, or, indeed, in the internal affairs of any voluntary association, society or club.'²⁵³ This reservation is not relevant to internal disputes within corporations. Of course, rather than being viewed as a negative factor, from an improved governance perspective, this increased liability to the scrutiny of courts may well be a ground in favour of the company limited by guarantee structure. Again, if this were so, one might expect a more considered and reasoned explanation from the ASC to justify the requirement of Principle 1.10.

Remuneration

The issue of executive remuneration is a significant current issue of corporate governance.²⁵⁴ The ASX principles include a specific principle on this issue²⁵⁵ whereas the ASC Principles are silent on this matter.²⁵⁶ Yet the matter is not irrelevant for NSOs. While the liability of volunteer directors of an NSO is the same as the director of a for-profit corporation, the volunteer NSO director may receive no remuneration. This may act as a disincentive to service in such a role.

Further, while there may not be the same concerns about huge increases in salaries for NSO executives as there are in the corporate world, significant salaries and salary increases that are disproportionate to general community

²⁵² For example Cycling Australia, Rowing Australia, Australian Canoeing, Yachting Australia, Australian Volleyball Federation and Australian Water Polo: Australian Sports Commission, *NSO 2009/10 Grants and Allocations*, above n 1.

²⁵³ *Cameron v Hogan* (1934) 51 CLR 358, 384 (Starke J). Although this general principle has been distinguished in a number of cases: see for example *McKinnon v Grogan* (1974) 1 NSWLR 295; *News Ltd v Australian Rugby League Ltd* (1996) 21 ACSR 635; *Buckley v Tutty* (1971) 125 CLR 353, 373–4; *Malone v Maher* [1981] 2 NSWLR 894, 898. But see *Cox v Caloundra Golf Club Inc* [1995] QSC 246 (27 September 1995). See also Paul Hayes, Current Problems in the Resolution of Sporting Disputes in Australia (2004) 2 (May) *International Sports Law Review* 22, 23–4.

²⁵⁴ See for example 'Pay Attention', *The Economist*, 14 June 2008; Thomas Clark, above n 43, at 72–9; Brian Cheffins and Randall Thomas, 'Regulation and the Globalization (Americanization) of Executive Pay' in Curtis Milhaupt (ed), *Global Markets, Domestic Institutions: Corporate Law and Governance in a New Era of Cross-Border Deals*, (Columbia University Press, 2003) Ch 5; and Australian Institute of Company Directors, *Executive Remuneration: Guidelines for Listed Company Boards*, (February 2009) 6–8.

²⁵⁵ ASX Principles, above n 8, Principle 8: Remunerate fairly and responsibly.

²⁵⁶ Some further brief advice is contained in Australian Sports Commission, *Governing Sport – The Role of the Board*, above n 7, 25.

movements are not unknown to NSOs.²⁵⁷ It is also conceivable that there may be a remuneration problem at the other end of the spectrum to that being experienced with corporate salaries: because of their non-profit nature and uncertain cash flows, NSOs may not reward their senior executives at a level sufficient to attract candidates with the desired or requisite skills and experience.²⁵⁸ While this last point may be merely speculative in the absence of supporting empirical evidence, the point to be made is that the issue of remuneration perhaps should command sufficient importance as a governance issue to warrant attention in the ASC's Principles.

Volunteers

The role of volunteers in Australian sport is acknowledged in the introduction to the ASC's Principles: 'Volunteer boards, committees and administrators in particular carry extra responsibilities and burdens associated with the complex legal and regulatory environment within which they must operate.' The contribution of these volunteers is said to be 'of immeasurable value to the community.'²⁵⁹ Despite this acknowledgment of the role of volunteers, the ASC Principles contain scant guidance as to how NSOs are to deal with issues regarding volunteers. And there are real volunteer-related, governance issues.

An increase in the focus on accountability to government, financial reporting, board procedures, risk management and other areas of traditional corporate governance is credited with impacting on not-for-profit organisations' ability to attract volunteers.²⁶⁰ In addition, 'dual leadership' in which the roles of the volunteer board chair and the paid CEO may conflict has also been identified as an issue flowing from the professionalisation of non-profit sport.²⁶¹

To be fair, it is difficult to conceive of what additional substantive matters ought be included by the ASC in its Principles to assist NSOs deal with these issues relating to volunteers.²⁶² It may nevertheless be legitimate to expect a more substantial discussion than mere 'motherhood' sentiments.

²⁵⁷ For example, the AFL CEO Andrew Demetriou is reported to have earned \$1.4 million in 2007, a salary that almost doubled in two years. Football Federation of Australia CEO Ben Buckley is reported to earn up to \$850,000 per year: Courtney Walsh, 'AFL boss Demetriou in a class of his own', *Weekend Australian* (Australia), 1 March 2008, 57.

²⁵⁸ This was an issue raised by some sports in submissions to the Independent Sport Panel in relation to the retention of elite coaches: Independent Sport Panel, *The Future of Australian Sport*, above n 6, 106.

²⁵⁹ Australian Sports Commission, *Governance Principles*, above n 2, 1. There are approximately 1.5 million volunteers involved in clubs and sports associations in Australia: Parks and Leisure Australia, *Submission to the Independent Sport Panel*, 7 November 2008, 2.

²⁶⁰ Cahill, Armstrong, and Storey, above n 43, 4; Independent Sport Panel, *The Future of Australian Sport*, above n 6, 108.

²⁶¹ Hoye and Cuskelly, above n 4, 143–8.

²⁶² Despite finding that 'Australia needs a system which supports the efforts of volunteer coaches, administrators and officials at all levels of sport' (Finding 29: at 101), the Independent Sport Panel provided no recommendations relating to governance measures that could be adopted by NSOs to ease the difficulties facing volunteers. It did recommend Australian Government funding of various volunteer programs: Independent Sport Panel, *The Future of Australian Sport*, above n 6, Recommendations 6.1 and 6.2.

Federal Structures

The ASC itself is a creature of a federal system of government. It organises itself and carries out its activities within a federal system, for example it partners with state/territory departments of sport and recreation to develop and deliver programs and services to build the sustainability, capability and capacity of the sport industry in Australia,²⁶³ although these activities are criticised in the Independent Sport Panel Report.²⁶⁴

The ASC advocates a ‘one state one vote’ voting system in federal sporting structures. Proportional voting is not recommended on the basis that ‘large member bodies should not be able to dominate the direction of an organisation.’²⁶⁵ Associated with this view, Principle 1.8 requires that NSOs and their member bodies have aligned objects and purpose. A single strategic plan applying across a sport is considered essential ‘to ensure effective and efficient achievement of sport outcomes’, particularly in a federated model. The single strategic plan is intended to be the basis of ‘all local implementation outcomes and be developed with input and agreement from all stakeholders’.²⁶⁶ The Principles also note that ‘All members should embrace the strategic plan of the sport and should work towards the achievement of its outcomes. In federated organisational structures it is essential that member bodies are working towards a unified strategic document and a held accountable for their outcomes.’²⁶⁷

Given the difficulties of coordination across vested sectional interests within a federal structure, this Principle is striking in what must be regarded as its naivety or failure to meaningfully deal with the reality that, unlike centrally controlled corporations, a federally structured NSO will not necessarily have the means to achieve this alignment of objects and purpose across its sport. A single strategic plan nationally and locally implemented may be mere wishful thinking. Affirming this, the Independent Sport Panel noted that most NSOs are hindered by federated structures, leaving NSOs ‘struggling to gain consensus, alignment and resources to create a nationally unified vision and product.’²⁶⁸ Federal structures were considered to be inherently flawed by embodying conflicts of interest between the national interest of a sport and the individual state or territory interest of the representative directors. Talent pathways, major sponsors and participant information that could form the basis of sponsorships are matters required to be managed nationally:

²⁶³ Australian Sports Commission, *Funding* <<http://www.ausport.gov.au/supporting/funding>> .

²⁶⁴ The Independent Sport Panel recommends that the ASC not be involved in service delivery as this gives rise to conflicts of interest in the ASC’s dealings with other agencies (Recommendation 2.2). It also recommends that the AIS be removed from the ASC and merged with state and territory institutes and academies of sport into a single Australian Institutes of Sport to be funded by the Australian Government at existing combined funding levels (Recommendation 3.1): Independent Sport Panel, *The Future of Sport in Australia*, above n 6.

²⁶⁵ ASC Principles, above n 2, Principle 1.4, Commentary and guidance, 4.

²⁶⁶ *Ibid* Principle 1.8.

²⁶⁷ *Ibid* Principle 5.1.

²⁶⁸ Independent Sport Panel, *The Future of Sport in Australia*, above n 6, 23.

‘The day of each state/territory having its own separate ‘company’ with its own chief executive officer (CEO) has surely passed. There is duplication across the country. The systems are incompatible. Each business is sub-scale which limits the capacity to hire and offer career progression to good people. National sponsors are not interested where neither state and territory participation nor even consistent data collection can be assured.’²⁶⁹

Conceding that extreme pressure may be required, the instrument recommended by the Independent Sport Panel for the ASC to achieve the goal of having the elite end of a sport being ‘run as a national business with a governance board selected on the basis of skills and not state/territory representation’ is for the ASC to tie funding support to NSOs’ readiness to change.²⁷⁰ The potential effectiveness of this mechanism is uncertain. In neither of the two examples provided by the Independent Sport Panel of sports that have successfully made dramatic changes to their governance systems was ASC funding an influence, though the position may be different in the case of other sports more reliant on ASC funding.²⁷¹

Conclusion

The ASC Principles are concerned with the accountability of government funding and have the legitimate and laudable objective of improving the organisational performance of NSOs. However, the analysis that has been undertaken above has established a number of shortcomings in the form and approach of the Principles. Foremost amongst these shortcomings is the prescriptive approach embodied within the ASC Principles. There is a strong case for this approach to be abandoned in favour of transparency and a disclosure regime similar to that contained in the ASX Principles. There is some irony in the fact that the ASC Principles borrow heavily and at times inappropriately, from the corporate sphere but simultaneously fail to also adopt the key mechanism that underpins the effectiveness of the corporate governance regime.

This change alone would allow for flexibility to apply in the application of the principles to NSOs who would be able to take real advantage of a genuine ‘if not, why not’ approach. An example of an area in which there is a glaring need for such an approach is the company limited by guarantee issue.

The shortcomings in the ASC Principles principally arise from a failure to sufficiently account for the specific nature of NSOs. This failure undermines the effectiveness of the Principles not only in terms of the achievement of

²⁶⁹ Ibid 24.

²⁷⁰ Ibid. See also Recommendation 4.2.

²⁷¹ Ibid 25. The examples are the Australian Football League and the Football Federation of Australia.

their objective of improving organisational performance but also in ensuring accountability for the public funds that are allocated to NSOs by the ASC. If, free from the discipline that transparency and a requirement to disclose non-compliance would bring, NSOs are free to adopt or not adopt the Principles, the very worth of the Principles is brought into question. Similarly, if NSOs resist the adoption of the Principles because they lack relevance and are inappropriate to the circumstances of the NSO, the legitimacy and value of the Principles are weakened. A review of the ASC Principles to address the matters identified in this paper would increase the likelihood of the ASC's objectives being met.